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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RABINER & JONTOW, INC.,
a corporation now known as
ABBE RABINER, INC.,
Petitioner

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	18
APPENDICES:	
A. Statutes	1a
B. Opinion and Judgments Below	2a

CITATIONS

CASES:

Abby Kent Co., Inc., et al., Docket No. C-328 et al. (August 9, 1965) (CCH Trade Regulation Reporter, Transfer Binder, Complaints and Orders, 1965-1967, Sec. 17310, dissenting opinion of Commissioner Elman, p. 22466) 8, 9, 10, 11

Federal Trade Commission v. *Universal-Rundle Corporation*, 387 U. S. 244 ..... 2, 10, 14, 17

Federal Trade Commission v. *Universal-Rundle Corporation*, (No. 1222, Supreme Court of the United States, October Term, 1965) 17

Moog Industries, Inc. v. *Federal Trade Commission*, 355 U. S. 411 ..... 2, 10, 14, 17

STATUTES:

Clayton Act, as amended:
Section 2(d), 49 Stat. 1527, 15 U. S. C. 13(d) .. 1a
Section 2(b), 49 Stat. 1526, 15 U. S. C. 13(b) .. 1a

PAGE

MISCELLANEOUS:

Washington Law Review, Vol. 42-October, 1966, *"The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal"*, by Philip Elman 14

Hearings Before Subcommittee of the Committee on Appropriations, House of Representatives, Independent Offices, 89th Congress, 1st Session Part 3, pp. 404-405 15

Hearings before Subcommittee of the Committee of Appropriations, United States Senate, 89th Congress, 1st Session, pp. 828-830 15

Address by Paul Rand Dixon, Chairman of FTC, before Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia, June 15, 1965 16

Some Criteria for Applying Industrywide Enforcement Measures under the Robinson-Patman Act, an address by Commissioner Everett McIntyre before the Indiana Continuing Legal Education Forum, Notre Dame University, September 25, 1965 17

Voluntary Law Enforcement: An approach to "Administrative Delay, an address by Paul Rand Dixon, Chairman of the FTC, Briefing Conference on Restraint of Trade and Trade Regulations, Shoreham Hotel, Washington, D. C., March 17, 1965 16

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FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Erwin Feldman, attorney on behalf of Rabiner & Jontow, Inc., now known as Abbe Rabiner, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix B, *infra*, pp. 2-12a).

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1967 (Appendix B, *infra*, p. 2a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals has properly exercised its authority as a reviewing court by affirming the Federal Trade Commission cease and desist order and has properly interpreted the opinions of this Court in *Moog Industries, Inc.*, 355 U. S. 411 and *Federal Trade Commission* v. *Universal-Rundle Corporation*, 387 U. S. 244.

STATUTES INVOLVED

The pertintent provisions of Section 2(b) and 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1527, 15 U. S. C. 13(d). (Appendix A, p. 1a)

STATEMENT

In 1961, the Federal Trade Commission began an investigation of alleged discrimination between competing customers in the granting of advertising and other promotional allowances by garment manufacturers. The investigation, although styled an industry investigation, was, in fact, an investigation into a series of different apparel manufacturing groups which manufactured both men's and women's apparel of various types. It was therefore a misnomer from the outset to call it a single industry investigation and as a result of this misnomer, various errors were committed both by the court below and the Commission in dealing with this question.

As a result of this investigation, the Commission issued an invitation to 310 manufacturers offering them an opportunity to sign consent agreements to cease and desist from granting discriminatory allowances. Of the entire number, representing various manufacturing groups 298 manufac-

turers signed such consent agreements. The petitioner herein, a manufacturer of women's coats and suits, retailing from $70. to $90. and several others, refused. The Commission, thereafter, issued a formal complaint alleging that the petitioner had violated Section 2(d) of the amended Clayton Act. 15 U. S. C. par. 13(d). (Appendix A, p. 1a)

Prior to the issuance of such complaint in this proceeding, the Commission held a public hearing on the 17th day of October, 1962, at which time statements were made by the Chairman of the Commission's enforcement program in connection with the violations of Section 2(d) of the Clayton Act, the Commission having found that:

> ". . . there are *widespread* violations of the law among suppliers of wearing apparel to department stores resulting from disproportionate advertising allowances. On the basis of this information the Commission could have issued complaints against a number of individual suppliers and, no doubt, obtained orders to cease and desist against them. This might have made our record look good to those who judge our accomplishments by the number of orders entered. However, it would have created competitive inequities and it would have been inconsistent with our policy of proceeding on an *industry-wide basis* where practicable. Additionally, the Commission had information to the effect that many suppliers desire to comply with the law in the granting of advertising allowances and that they would comply if they had some assurance that their competitors were likewise complying. (Emphasis supplied)
>
> "The Commission, thereupon, devised a procedure under which *all of the suppliers of wearing apparel* who the Commission had reason to believe were violating the law through the granting of dis-

> proportionate advertising allowances would be proceeded against simultaneously. Under this procedure formal complaints were sent to 149 suppliers, each of whom was extended the opportunity of disposing of the case through the executing of an agreement providing for the entry of a consent order. Many of the suppliers immediately availed themselves of this opportunity and returned the executed agreements. In the meantime, however, it came to the Commission's attention that a number of the more substantial members of the industry were not included in the original group, and the proceedings have now been suspended pending a determination as to what additional firms should be included." (Emphasis supplied) (R. pp. 118a and 119a.)[1]

All the evidence produced in the proceedings indicated that this was not a specific industry proceeding but dealt with a number of separate and distinct industry groups.

Two of the Commissioners, namely Messrs. Elman and Higgenbotham filed a strong dissenting statement to the views of the Chairman at this hearing. (R. pp. 120a-129a)

In their statement the dissenting Commissioners elaborated on the prior procedures of the Commission in selecting approximately 300 manufacturers against whom it had charged violation of Section 2(d) of the Robinson-Patman Act. Statements were made at this hearing that there were approximately 34,500 manufacturers of wearing apparel and apparel accessories in the United States and regarding this figure the dissenting Commissioners stated:

> "Even assuming that this estimate is exaggerated, if the 310 companies investigated by the Commission represent a fair sample, the number of

[1]References, unless otherwise indicated, are to the Joint Appendix.

manufacturers in the apparel industry who are granting illegal advertising allowances may run into thousands." (R. p. 121a.)

and gave a strong dissent to the procedure adopted by the Commission and stated as follows:

"While there is no disagreement as to these objectives, different opinions were expressed at the October 17 conference as to the most effective means for accomplishing them. On the one hand, some industry spokesmen urged the Commission to follow the traditional approach of issuing individual complaints and cease-and-desist orders. Even those representatives recognized, however, that this approach could not hope to succeed unless (a) the cease-and-desist orders were accepted voluntarily, through consent agreements signed by all or almost all manufacturers, and (b) such consent orders were issued and made effective simultaneously, and in a number running to many hundreds if not thousands. For example, the counsel for various trade associations comprising the dress manufacturing industry in metropolitan New York stated that the Commission:

'should aim for the broadest possible coverage, by simultaneously issued cases and desist orders directed at the *large segments* of the apparel manufacturing industries as is practicable. * * * (Emphasis supplied.)

Unless the apparel industries were covered as a whole, and on equal terms, the manufacturers who cannot grant discriminatory advertising concessions because of outstanding cease and

> desist orders would necessarily lose their businesses as long as other manufacturers continue willing and able to yield to the unreasonable and unlawful demands of volume buyers. As the Commission's experience teaches, the mere existence of the Statute is not sufficient to stop the illegal practice, and in the absence of cease and desist orders applicable to them competitors will continue to take advantage of this inequitable situation'."
> (R. pp. 122a and 123a.)

Other procedural attacks were made upon the Commission's program of singling out several manufacturers from literally thousands of firms and subjecting them to the cease and desist orders without taking any action against the remainder of the industries. (We urge the Court to read the full text of Commissioners Elman and Higginbotham objections to the procedures adopted by the Commission in instituting the apparel investigations. (R. pp. 120a-129a.)

Notwithstanding these attacks upon the Commission's procedure, the Commission, nevertheless, proceeded with its original plan and sent each of the several hundred firms which it had included in its enforcement drive a letter similar to the one sent to Rabiner & Jontow, Inc. (R. pp. 130a-132a.)

Rabiner & Jontow, Inc. refused to sign such a consent agreement and a formal complaint was issued in these proceedings and hearings held.

Following the hearing, an Initial Decision by the Hearing Examiner was made to which an appeal was taken before the Federal Trade Commission. During the course of the hearings, before the Hearing Examiner, the company acknowledged and stipulated that it had given certain allow-

ances to customers named in certain cities mentioned in the complaint without granting similar allowances to other retail stores in the same community. Nowhere in the Commission's case was reference made to the industry investigation upon which the complaint was based, nor was any evidence offered to contradict that at most 7[1] coat and suit firms were included in this investigation from hundreds of competing firms. No explanation was made as to how, by obtaining cease and desist orders against only 7 coat and suit firms would result in compliance with the Robinson-Patman Act, insofar as discriminatory advertising allowances were concerned in this industry and taking no action against literally hundreds of the remaining firms in the industry.

None of the facts introduced by Rabiner & Jontow, Inc. concerning the number of firms in the industry (which we will comment upon later) or the practices in the coat and suit industry with regard to the granting of advertising allowances throughout the industry and its impact on competition were rebutted. The Commission's position, in brief, was nothing more than presenting evidence of isolated instances of the granting of allowances on disproportionate terms in certain cities during certain years.

The decision of the Hearing Examiner proceeded as if there were no investigation and as if this were a simple individual case of 2(d) violation. The Hearing Examiner, in his Initial Decision, did comment upon the fact that Rabiner & Jontow, Inc. has established as a defense that:

> "Non-proportionalized cooperative advertising payments are rampant in, and an integral part of, the

[1]Statements had been made from time to time that the total number of women's coat and suit companies covered by consent orders was 7 or 8. The reason for this confusion is predicated on the fact that one of the companies had gone out of business and it is presently believed that the number of orders in the women's coat and suit industry under investigation, totals 7.

> modus operandi of the garment industry. *Complaint counsel did not contest this assertion.*" (Emphasis supplied) (R. p. 17a)

Indeed, in the Initial Decision, the Hearing Examiner stated affirmatively:

> "The Federal Trade Commission's investigation alluded to above (see RX24) found such to be the fact."

The "fact" referred to was the prevalence of *widespread* violations in all branches of the apparel industry, and the Hearing Examiner concluded:

> "The fact that the garment industry, as such, is engaged in making non-proportionalized cooperative advertising payments does not exculpate or excuse unlawful payments." (R. p. 17a)

and he cited various authorities. (R. p. 18a) None of these cases arose under industry investigations. The Initial Decision went on to theorize the circumstances under which the respondent, Rabiner & Jontow, Inc. could be exculpated and declared that such discriminatory payments could only be made under such circumstances. (R. p. 19a)

When this proceeding was brought before the Commission on petitioner's appeal from the Initial Decision of the Hearing Examiner, the Commission sustained the evidence of the Hearing Examiner. The Commission attempted to answer the petitioner's argument that the violations of 2(d) have been *widespread* in the apparel industry and the Commission made no attempt to correct these illegal practices to which the Commission responded by pointing out that in its decision in the matter of *Abby Kent Co., Inc. et al.*, Docket No. C-328 et al. (August 9, 1965) (CCH Trade

Regulation Reporter, Transfer Binder, Complaints and Orders, 1965-1967, Sec. 17310, dissenting opinion of Commissioner Elman, p. 22466) a proceeding which was part of this so-called industry-wide investigation and in which decision the Commission reviewed its action begun in 1961 of discriminatory advertising and promotional allowances given to the apparel industries, the Commission stated as follows:

> "The Commission thus having reason to believe that violations of section 2(d) existed throughout the industry made the determination, after considering and rejecting other proposed remedial approaches, that a general correction of these practices could best be accomplished by affording members of the industry an opportunity to sign consent agreements containing orders to cease and desist from granting discriminatory allowances. Subsequent thereto, the Commission during a period of approximately two years accepted agreements and orders from 298 apparel producers including *those significant sellers who were granting the largest amounts of allowances to the greatest number of buyers.* On August 9, 1965, all outstanding orders were made effective, *the Commission having determined at that time that this particular phase of the wearing apparel industry was for the most part terminated* and that 'The few unresolved matters *do not involve suppliers who constitute a force capable of competitively disadvantaging those industry members who will be under order.' Abby-Kent, supra.* The Commission further pointed out that its enforcement program in this industry would, when necessary, be supplemented by formal proceedings against selected buyers who knowingly induce or receive discriminatory allowances." (R. p. 77a) (Emphasis supplied).

We have never been informed on what basis the Commission decided to terminate the hearing or what evidence it had to support the contention that those who were proceeded against constituted a force which would provide satisfactory coverage.

It should be clear that the conclusion of the Commission had covered enough suppliers in the women's coat and suit industry to adequately deal with the question of compliance, a conclusion reached by the Commission and approved by the court of appeals decision that it may not challenge such question, as this is exclusively within the expertise of the Commission.

This, in effect, establishes the Commission as the sole authority for its conduct. Only the Commission can pass on the question of whether or not it has acted arbitrarily and this is how the court below applied the decisions in *Moog Industries,* supra, and *Universal-Rundle,* supra. This is obviously in contradiction to the statement which appears in *Moog Industries, Inc.*, supra, ". . . The Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry".

It should be noted further that even though the Commission in *Abby Kent,* supra, is dealing with all branches of apparel, the total number of orders obtained in the women's coat and suit industry remained constant at 7 and in the decision of the court of appeals, reference[1] is also

[1]The court of appeals, in its decision (Appendix B) states that the Commission earlier claimed that there was widespread violations in the apparel industry, apparently removed by the 298 consent orders. The court leaves the impression that the widespread nature of the violations among women's coat and suit manufacturers was also removed but it should be remembered that at all times the total number of orders in the women's coat and suit industry never exceeded 7, so the statement that the total number of consent orders obtained by the Commission since the institution of proceedings did not have any material effect upon the conditions prevailing in the women's coat and suit industry, as this figure never changed.

made to the Commission's statement as indicating the Commission's attempt to deal fairly with the problem, but it fails to recognize that at all times there were only 7 firms against whom orders were obtained and the references to 298 apparel orders or agreements can have no relevence in considering the women's coat and suit industry situation.

We challenge this finding and point out that it is contrary to the facts presented before the Hearing Officer and includes a number of assumptions not sustained by the evidence and refers to a broad wearing apparel inquiry when there were at least 20 different industries involved in this so-called wearing apparel industry investigation, none of whose divisions were related to each other.

Included among companies mentioned in *Abby-Kent,* supra, are at most 7 coat and suit manufacturers, of which this petitioner was included, out of a total of approximately 500 manufacturers. The total number of all the firms included in this so-called apparel investigation would exceed about 35,000 as found by the dissenting opinion at the beginning of this investigation.

A strong dissenting opinion in this case was filed by Commissioner Elman in the *Abby-Kent, supra,* ruling. He took up each of the contentions of the Commissioners and strongly refuted a number of conclusions. Commissioner

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Also, the statement in the court of appeals decision that the Commission was conducting its investigation and had, since the conclusion of the proceedings, obtained 6 orders against additional suppliers, in no way affects this conclusion as none of the suppliers, whose names are set forth in the opinion of the court, were in the women's coat and suit industry and thus again this statement has no bearing on the situation prevailing in the women's coat and suit industry. This is where the contention lies. For one purpose the court assumes that all apparel manufacturers are in one industry and uses the total figures for that one purpose without recognizing that they consist of a series of men's and women's product manufacturers, none of which compete with each other and that in the women's coat and suit industry to date there are only 7 effective consent orders even though the industry is composed of upwards of 500 manufacturers and it is conceded by the Commission that almost 200 are in competition with the petitioner.

Elman discussed the investigation from its beginning in 1962 and pointed out that he had taken a strong dissent to the early findings of the Commission enforcement procedures.

Commissioner Elman also dissented from the decision of the Commission in the instant case. (see R. pp. 84a-88a for text of dissenting opinion) Commissioner Elman pointed out that violations of Section 2(d) have been wide-spread in the apparel industry. He found that individual suppliers as the petitioner (Rabiner & Jontow, Inc.) have felt compelled to grant such allowances because of general competitive conditions in the industry. The wearing apparel industry, he noted:

> "... is highly fragmented, consisting of thousands of manufacturers, most of them very small in relation to the chain and department store buyers. For most manufacturers, the buyer is in the driver's seat; whatever he wants in the way of advertising or promotional allowances, the buyer is usually in a good position to get." (R. pp. 84a-85a)

He further pointed out that petitioner, Rabiner & Jontow, Inc., is:

> "... one of the two suppliers, out of the group of about 300 sued by the Commission, which refused to sign 2(d) consent orders. The suppliers which signed such orders represent only a fraction of the entire industry, and only eight of the outstanding orders are directed against members of respondent's particular segment of the industry—ladies' coats and suits." (R. p. 85a)

He further stated:

> "As respondent points out, more than 500 of its direct competitors are not under orders. It is

not hard to see why an enforcement policy designed to place even a substantial number of suppliers under order can accomplish little. The ability of large and powerful buyers to exact discriminatory allowances from suppliers not under order remains unimpaired. Even if the Commission could be sure of full compliance with the outstanding orders, this basic gap would not be plugged. Moreover, the impression persists that issuance of these orders has had little or no effect in eliminating discriminatory allowances in the industry." (R. p. 85a)

He concluded:

> "I think it is also inequitable to issue this order against respondent" (Rabiner & Jontow). (R. p. 86a)

and pointed out that the Commission's decision pertaining to the appropriate manner for applying the 2(b) defense:

> "... imposes an impossible and unrealistic burden on sellers." (R. p. 86a)

In the decision below (Appendix B, *supra,* p. 8a), the court of appeals points out that the statute gives relief to anyone who claims prejudice under the Commission's rules. *Inter alia,* the court points out that nothing prohibits a seller from meeting competition by permitting the seller to step out of his normal plan and meet the direct competition of a competitor under such circumstances. This is patently wrong for the reason that the Commission has ruled that only *lawful* competition can be met under the statute. In the case of the women's coat and suit industry, this would mean at most 7 companies who have filed lawful

plans. Any attempt to meet any other kind of competition would subject the seller to the dire consequences provided for in the Act.

This issue has become the subject of wide discussions involving suggestions for a reappraisal of the Act to eliminate this possibility.[1]

In the light of the various interpretations placed by the courts on Section 2(d) insofar as applies to singling out of competitors and the availability of meeting competition defense, the issue is now placed firmly before the Court for timely review and reconsideration.

REASONS FOR GRANTING THE WRIT

As we understand the decision of the Court of Appeals in this case, the court's ruling in *Moog Industries,* supra, and *Universal-Rundle,* supra, places in the hands of the Commission sole authority whether or not it had acted arbitrarily, and such a question was, therefore, not subject to review by the courts. It is our contention that this determination removes from the area of judicial review one of the most important and vexing problems facing the FTC in dealing with

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[1]See Washington Law Review, Vol. 42—October, 1966, *"The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal"* by Philip Elman. On p. 16, Article V, *Meeting Competition Defense* begins with the statement: "No issue has produced more serious collisions between antitrust policy and the Robinson-Patman Act than the determination of the scope and availability of the meeting competition defense. . . ." and points up the problems of invoking the defense of meeting competition and on pp. 18 and 19 states: "Moreover, a serious question has been raised as to whether there should be rigid and absolute insistence that the price met must be a lawful one. Commissioner MacIntyre has said that 'the right of self-defense long recognized is available only to counteract wrongful and unlawful conduct . . . This inconsistency between recognized right of self-defense and what has been provided in the way of self-defense under the "good faith proviso" is left unexplained by the (Supreme) Court and the Commission'."

these cases. Strong dissenting opinions in all these proceedings and the opinions of the Commissioners themselves, publicly and privately given, indicate how serious this problem has become.

The vexing nature of the problem is illustrated by the testimony given by the Chairman of the FTC in a recent hearing before a Subcommittee of the House of Representatives of the 89th Congress:

> "We have given a mandate to our enforcement bureaus. Instead of taking these cases as they come, one by one, the first thing they are to determine is whether or not this is an isolated situation that has come to our attention or whether it is something that is engaged in competitively by all the competitors. If so, to step back and, then with our resources, engage in what I would hope to be some basic planning and determine which would be the best tool and approach for us to take. . . ."
>
> "Historically, the Commission was wedded to the procedure of taking our customers or their cases as they come. The Commission had hoped . . . that with the tools that Congress had afforded the Commission to work with that even on the case by case method that proceedings against one, the others, if it affected them would take notice and follow suit. It just didn't work that way. . . . *It could be said in all fairness to these people that if there were 50 engaged in the same practice, what certainty would a party have that if they stopped, the other 49 would stop.* In our country, very rarely can a man be his brother's keeper. I think this is the basis of law. We are trying to enforce our law in the American way, equitably and fairly." (Emphasis supplied) (FTC Statement, Hearings before a Subcommittee of the Committee

of Appropriations, House of Representatives, Independent Offices, 89th Congress, 1st Session, Part 3, pp. 404-405. See also: Hearings before Subcommittee of the Committee of Appropriations, United States Senate, 89th Congress 1st Session, pp. 828-30.)

The Commission's reasons for this enforcement program have been lucidly explained in several speeches by the Chairman of the Federal Trade Commission as well as other members of that Agency. Chairman Dixon, in a recent address, informed a group of American businessmen:

> "It must be recognized that some illegal practices are so widespread within an industry that to single out a few of the sinners would be *unfair. Simple justice would dictate* that the approach to the problem be of sufficient scope to give all violators an opportunity to rid themselves of the illegality simultaneously and without suffering competitive injury in the process." (Emphasis supplied)
>
> (Address by Paul Rand Dixon, Chairman of FTC, before Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia, June 15, 1965.)

In the same vein Chairman Dixon has recently stated:

> "The man who is willing to comply with the law simply can't afford to if his competitor is allowed to go on violating it."
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> (*Voluntary Law Enforcement: An Approach to 'Administrative' Delay,* an address by Paul Rand Dixon, Chairman of the FTC, Briefing Conference on Restraint of Trade and Trade Regulations, Shoreham Hotel, Washington, D. C., March 17, 1965.)

See also a recent address of Commissioner Everett McIntyre on *Some Criteria for Applying Industrywide Enforcement Measures under the Robinson-Patman Act,* before the Indiana Continuing Legal Education Forum, Notre Dame University, September 25, 1965.

All the Commissioners appear to agree with petitioner herein and with the dissenting opinions filed except that they do not apply their publicly expressed views to cases which come before them.

It must appear indeed strange to this Court that in the light of the expressed views of the Commissioners themselves and the statements made by dissenting Commissioner, that the problem of singling out companies, particularly in Robinson-Patman cases, and the inability of the Commission to deal with the industry generally in an industry-wide situation has reached a stage of serious proportions. In the Commission's brief in support of its petition for a writ of certiorari, filed in the October Term, 1965, in the Supreme Court of the United States, in the matter of *Federal Trade Commission* v. *Universal-Rundle Corporation,* No. 1222) on page 17a there is annexed Appendix C by the Commission in which it points out that since 1964, it has refused to stay 12 orders in various industries which have all claimed that they were being sorely prejudiced by the failure of the Commission to obtain compliance orders against their competitors. This points out how serious this problem has become in the light of the present application and other current cases, that remedy must be found to deal with this matter.

This Court should review this entire record and determine whether or not the court of appeals is properly interpreting the prior rulings of the court laid down in *Moog Industries,* supra, and *Universal-Rundle,* supra. The problem has become so serious that the growing demand for relief which currently exists in many industries must com-

pel this Court to review this situation and determine whether or not it can change the present practice of the Commission which appeared to create several classes of competitors —those who are covered by restraining orders and those who are not. It might very well indicate that the present statute is inadequately drawn so as to preclude such relief. If this is true, the statute must be struck down or other relief granted on the ground that it fails to provide "equal justice under law" for competitors in the women's coat and suit industry.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN FELDMAN,
Attorney

February 1968.

APPENDIX A

Statutes

Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1527, 15 U. S. C. 13(d) provides in part:

> (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by and through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

The relevant portion of Section 2(b) of the Clayton Act provides:

> That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by the competitor.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 35—September Term, 1967.

(Argued September 21, 1967 Decided December 5, 1967.)
Docket No. 30915

RABINER & JONTOW, INC., a corporation
now known as ABBE RABINER, INC.,
Petitioner,

—v.—

FEDERAL TRADE COMMISSION,
Respondent.

Before:

WATERMAN, MOORE and FEINBERG,
Circuit Judges.

Petition for review of an order to cease and desist issued by the Federal Trade Commission at the conclusion of hearings upon a complaint charging petitioner with violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(d).

Order of the Commission affirmed and enforced.

MOORE, *Circuit Judge*:

In 1961, the Federal Trade Commission (the Commission) began an investigation into alleged discrimination

between competing customers in the granting of advertising and other promotional allowances by garment manufacturers. The result of this investigation was an invitation by the Commission to 310 of these manufacturers, offering them an opportunity to sign consent agreements to cease and desist from granting discriminatory allowances. Although 298 manufacturers signed, petitioner, a manufacturer of women's coats and suits which retail from $70.00 to $90.00, and several others refused. The Commission thereupon issued a formal complaint, alleging that petitioner had violated Section 2(d) of the amended Clayton Act, 15 U. S. C. § 13(d),[1] by granting advertising and promotional allowances to some customers without making such allowances available to other competing customers on proportionally equal terms.[2] The hearing examiner issued an initial decision and cease and desist order sustaining the allegations of the complaint and holding that petitioner had failed to establish its defense that the advertising allowance payments were made in good faith to meet competition. The Commission, Commissioner Elman dissenting, affirmed the decision and order of the examiner.

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[1]Section 2(d) provides:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[2]The parties entered into stipulations to the effect that during the period in question advertising allowances were granted to six favored customers in three cities and were not paid to other competing customers in those cities who purchased identical goods from petitioner. The favored customers were large retail stores in New York City, Boston and Washington, D. C.

Appendix B

On appeal to this court, petitioner no longer disputes the Commission's finding that it violated Section 2(d) of the Clayton Act. Instead, petitioner urges that the cease and desist order be set aside because it was an abuse of the Commission's discretion to proceed against it while there remains a large number of others engaged in the same illegal practice. Petitioner argues that the Commission acted arbitrarily in issuing the cease and desist order while petitioner's competitors are free to continue their prior practice.

There have been no instances where a complaint has been dismissed or an order set aside simply because it was directed against a single respondent in the face of evidence of industry-wide violations. The most petitioner could hope to obtain from this court is a stay of enforcement of the cease and desist order. Two Supreme Court decisions suggest that, in a proper case, a stay may be obtained until the Commission can conduct a larger investigation and gain more complete compliance. This, however, is not such a case.

In *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U. S. 411 (1958) (*per curiam*), the Supreme Court refused to grant a stay of an order against one firm until competing firms could be similarly restrained. There the Court noted the peculiar discretion given to the Commission in the shaping of its remedies.

> "In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commisison order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legis-

lation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant 'industry' within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." 355 U. S. at 413.

In *Universal-Rundle Corp.* v. *Federal Trade Commission,* 352 F. 2d 831 (7th Cir. 1965), the Court of Appeals

ordered that a cease and desist order be stayed until further action could be taken against the respondent's competitors. Although the discriminatory price discounts of that case were prevalent in the industry, the Commission selected for enforcement Universal-Rundle which had only 6% of the market and which was granting relatively smaller discounts than its competitors. The Supreme Court reversed, 387 U. S. 244 (1967), and set forth some guide lines for review in this area.

> ". . . Consequently, the reviewing court's inquiry is not whether the evidence adduced in support of a petition for a stay tends to establish certain facts, such as that the industry is engaged in allegedly illegal price discrimination practices; rather, the court's review must be limited to determining whether the Commission's evaluation of the merit of the petition for a stay was patently arbitrary and capricious." 387 U. S. at 250.

In the facts of the particular case before us, there is no indication that the Commission acted arbitrarily in proceeding against petitioner. An extensive industry-wide investigation was conducted and almost 300 consent orders were obtained before the present action was taken. The Commission held public hearings on how enforcement could best be achieved and various proposals were submitted from industry representatives. Even then, the Commission considered the possible competitive disadvantage its orders might have and waited until 1965 to make those orders effective. *Abby Kent Co., et al.*, FTC Docket No. C-328 *et al.* (August 9, 1965), CCH Trade Reg. Rep. (1965-1967 Transfer Binder) ¶17,301 at p. 22,461. At that time the Commission noted:

Appendix B

> ". . . For the most part this phase of the wearing apparel inquiry is terminated. The few unresolved matters do not involve suppliers who constitute a force capable of competitively disadvantaging those industry members who will be under the order." at p. 22,464.

Far from acting in an "arbitrary" manner, the Commission appears to have made every effort to achieve industrywide compliance in as equitable a manner as possible under the circumstances.

Petitioner insists that a proper determination of the relevant market will reveal that the garment industry is really a group of approximately 20 different kinds of men's and women's wear manufacturers, none of which compete with each other. Under petitioner's classification, it is in the *women's coat and suit* industry which numbers about five hundred firms. Of those firms, petitioner claims that it was one of only 7 or 8 involved in the Commission's complaint. The evidence as to the proper market division is not at all clear but, assuming petitioner's contention to be true, we still do not think there is a basis for finding that the Commission acted arbitrarily. Petitioner has not shown that violations of Section 2(d) are prevalent in that segment of the industry in which it operates. Its own expert witness testified only that "It was very widespread among top manufacturers and top stores," and that he would place petitioner "towards the top." Petitioner relies upon a statement issued by the Commission in 1962 that its investigation revealed "widespread violations." However, this observation was made *prior* to the time the Commission entered into the almost 300 cease and desist orders and does not support a contention that the same conditions continue to exist.

Appendix B

Petitioner has failed to show that compliance with the Commission's order will place it at a competitive disadvantage. Although petitioner alleges that widespread violations do in fact remain in the industry, it has never provided the Commission with names or other information upon which the Commission could take appropriate action. The Commission is continuing to take action against violators. See, e.g., *Clarise Sportswear Co., Inc.*, FTC Docket No. C-993 (consent order, September 20, 1965); *May Knitting Company, Inc.*, FTC Docket No. C-994 (consent order, September 20, 1965); *Huddlespun, Inc.*, FTC Docket No. C-995 (consent order, September 20, 1965); *Dan Millstein, Inc.*, FTC Docket No. C-1020 (consent order, December 7, 1965); *Susan Thomas, Inc.*, FTC Docket No. C-1185 (consent order, March 20, 1967); *Gladstone-Arcuni, Inc.*, FTC Docket No. 8664 (hearing examiner's order issued February 10, 1967).

Furthermore, the "good faith meeting of competition" defense provided in Section 2(b) of the Clayton Act,[3] is "implicit in every order issued under the authority of the Act, just as if the order set [it] out *in extenso.*" *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 476 (1952). (Even though petitioner is under a cease and desist order, it is free to establish its own nondiscriminatory promotional plan and, when necessary, offer certain customers the same amount as a competitor whose allowance it may have to meet. This would minimize any competitive

[3]The relevant portion of Section 2(b) provides:

> That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by the competitor.

disadvantage.) Petitioner argues, however, that it should be free from the Commission's order and be permitted to grant disproportionate allowances to meet competition generally without showing that any particular payment was made to meet a specific competitor's offer. Were such a practice to be approved, the very purpose of Section 2(d) would be frustrated.

For the foregoing reasons, the Commission's order is affirmed.

The Commission has filed with this court a formal cross-application for enforcement of the order under Rule 13(e) of the Rules of this Court. This was done in accordance with our instructions in *William H. Rorer, Inc.* v. *Federal Trade Commission*, 374 F. 2d 622, 627 n. 9 (2d Cir. 1967).

> "Only on the last page of its brief has the Commission made a cross-application for enforcement of its order pursuant to 15 U. S. C. § 21(c). We hold this application to be legally sufficient, but in the future the Commission should follow the orderly procedure for such an application set forth in our rules. Rule 13(e), Rules of the United States Court of Appeals for the Second Circuit."

The Commission urges that both the wording and history of Section 11(c) of the Clayton Act, 15 U. S. C. § 21(c), show that the intendment was that a court order of enforcement be entered automatically upon affirmance of the Commission's order. The relevant portion of the statute reads:

> ". . . To the extent that the order of the Commission or Board is affirmed the Court shall issue its own order commanding obedience to the terms of such order of the Commission."

Appendix B

Prior to its amendment by the Finality Act of 1959, Section 11 specifically required the Commission to file an application for enforcement before the Commission could obtain a court decree compelling obedience to its order. The purpose of the Finality Act of 1959, was to amend Section 11 of the Clayton Act to conform it to the procedures of Section 5(c) of the Federal Trade Commission Act, as amended, 15 U. S. C. § 45(c). *Federal Trade Commission* v. *Jantzen, Inc.*, 386 U. S. 228, 231 (1967). Section 5(c) of the Federal Trade Commission Act does not require a cross-application for enforcement.

> "[W]hen review is sought, if the Commission is affirmed, the Court of Appeals, pursuant to § 5(c) of the Act, shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. Thus, it is not the Commission which requests an enforcement order from the reviewing court. One is entered automatically." *United States* v. *Standard Distributors, Inc.*, 267 F. Supp. 7, 11 (N. D. Ill. 1967).

We are told by the Commission's counsel that no other circuit court requires the Commission to make a cross-motion for enforcement. Accordingly we hold that a cross-application for enforcement is not required by the amended Clayton Act and that our Rule 13(e) is not applicable. To the extent that *William H. Rorer, Inc.* v. *Federal Trade Commission, supra,* is to the contrary, it is overruled.[4]

The Commission's order is affirmed and enforced.

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[4]This opinion has been submitted to all members of the Court and they are in accord with this result.

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES COURTHOUSE
FOLEY SQUARE
New York 10007

A. DANIEL FUSARO
CLERK

January 19, 1968

Re: Rabiner & Jontow, Inc. v. F.C.C.
Docket No. 30915

Dear Sirs:

This Court has today disposed of the motion in the above entitled case thusly:

Motion (for a corrected order for stay)

Petitioner is granted until February 14, 1968 within which to file his petition for certiorari and the mandate of this Court is stayed until that date.

S. R. W.
L. P. M.
W. F.
U. S. C. JJ.

Very truly yours,

A. DANIEL FUSARO
Clerk

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of January, one thousand nine hundred and sixty-eight.

RABINER & JONTOW, INC., a corporation now known as ABBE RABINER, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated December 20, 1967 for a stay of decree pending petition for writ of certiorari to the Supreme Court of the United States be and it hereby is granted subject to the provisions of Rule 28(c).

/s/ STERRY R. WATERMAN
/s/ LEONARD P. MOORE
/s/ WILFRED FEINBERG
Circuit Judges

January 8, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RABINER & JONTOW, INC.,
a corporation now known as
ABBE RABINER, INC.,
Petitioner

v.

FEDERAL TRADE COMMISSION

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN FELDMAN
Attorney for Petitioner
1350 Broadway
New York, N. Y. 10018

NOTE: Items listed in this appendix constitute all the opinions of the Federal Trade Commission in this proceeding. The opinion of the court of appeals will be found annexed to the petition for a writ of certiorari in appendix B. Pages are numbered according to Joint Appendix.

INDEX

	PAGE
FINAL ORDER OF THE FEDERAL TRADE COMMISSION	11a
INITIAL DECISION OF THE HEARING EXAMINER	13a
OPINION OF THE COMMISSION	74a
DISSENTING OPINION	84a

Final Order

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of

RABINER & JONTOW, INC.,
a corporation.

Docket No. 8629

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal:

IT IS ORDERED that the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Final Order

By the Commission. Commissioner Elman dissented and has filed a dissenting opinion.

SEAL

JOSEPH W. SHEA,
Joseph W. Shea,
Secretary.

ISSUED: September 19, 1966

ATTACHED ARE: (1) Opinion of the Commission by Commissioner Reilly

(2) Dissenting Opinion by Commissioner Elman.

Initial Decision

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

In the Matter of

RABINER & JONTOW, INC.,
a corporation.

Docket No. 8629

By Leon R. Gross, Hearing Examiner.

Peter J. Dias, Myer S. Tulkoff, and
Thomas W. Smith, for the Commission.

Erwin Feldman, New York, New York,
and Alexander Kushner, Jersey City,
New Jersey, for the Respondent.

In this proceeding under Section 2(d) of the Clayton Act, as amended[1], respondent, Rabiner & Jontow, Inc., a New York corporation organized in 1942, which manufactures and sells in interstate commerce women's coats and suits which retail from $70.00 to $90.00, defends its admittedly non-proportionalized cooperative advertising pay-

[1] § 2(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal tems to all other customers competing in the distribution of such products or commodities.

ments to favored customers in New York, Boston, and Washington, D. C., in 1960, 1961, and 1962, by asserting that (1) this proceeding is not in the public interest because the entry of a § 2(d) order against respondent would retard, rather than promote, the legislative purposes of the statute; and (2) that its non-proportionalized cooperative advertising allowances were paid in order to meet competition.

Throughout the prehearing conferences and during the hearings, the hearing examiner has reiterated to respondent's counsel that the defense that this proceeding is contrary to the public interest is not of a sort which the hearing examiner is empowered to, or would, within the framework of this particular record, adjudicate. If such defense may be asserted and adjudicated, it can properly be passed upon only by the Federal Trade Commission, itself.

Respondent's answer admitted the material allegations of the complaint, but denied that its advertising payments or allowances to its customers violated Section 2(d) of the Clayton Act. In its answer, the respondent asserts "that in all instances referred to in the complaint, in which it is alleged that respondent made payments or granted allowances to customers for promotion of products of the respondent by means of advertising, in each and every instance, respondent made such allowances in good faith, to meet competition, and in accordance with the provisions" of the Clayton Act (Answer, p. 2). Respondent further asserts "that in every instance where such payments or allowances were made . . . that said payments or allowances were granted for the purpose of defending the respondent's position with its customers" and that respondent "did not engage in such practice for aggressive selling purposes" (Answer, par. 8).

Respondent alleged further that advertising allowances "were so firmly rooted and established that companies

similar to respondent were compelled, in order to protect their position as a resource, to grant allowances and payments to their customers to meet such competition" (Answer, par. 9).

It is well established now by judicial authority that a respondent charged with violating Section 2(d) of the Robinson-Patman Act may defend such charge by asserting a § 2(b)[2] or "meeting competition defense". *Exquisite Form Brassiere, Inc., et al.* v. *Federal Trade Commission,* 301 F. 2d 499 (C. A. D. C. 1961).

The discussion in this initial decision will focus principally on the effectiveness with which respondent has presented and proven its meeting competition defense.

Several years ago the Federal Trade Commission conducted an investigation into the garment manufacturing industry in general, and, on the basis of the results of that investigation, concluded that a substantial number of firms engaged in the manufacture and sale in interstate commerce of garments were in violation of Section 2(d) of the Clayton Act (RX 23A-23M). Opportunity has been afforded the various persons, firms, and corporations in the garment industry to avail themselves of the consent procedure provided for in Sections 2.1 through 2.4 of the Commission's

[2] § 2(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Rules of Practice for Adjudicative Proceedings. As a result of the industry-wide investigation and subsequent proceedings, 242 business firms have, as of the time of writing this initial decision, availed themselves of the consent procedure and have signed agreements containing orders to cease and desist which will be made effective by the Federal Trade Commission at a time and under circumstances which the Commission shall, in its discretion, determine to be appropriate.[3] As of the date of the writing of this initial decision, only two of the firms mentioned in the Press Releases have elected to proceed to formal hearing, the *House of Lord's, Inc.,* Docket No. 8631, and the instant proceeding. In the *House of Lord's* proceeding, the hearing examiner found that the cooperative advertising offer was proportionalized, i.e., made available on proportionally equal terms, and there had been no violation of Section 2(d). The complaint was dismissed and oral argument on appeal before the Commission has taken place.

In the instant proceeding, respondent admits and has stipulated that its cooperative advertising payments were not proportionalized, i.e., made available to all its customers on proportionally equal terms, but asserts that such cooperative advertising payments were made in good faith to meet similar practices by its competitors in the industry.

Respondent represents a specialized segment of the garment industry, i.e., women's coats and suits which retail from $70.00 to $90.00.[4] Respondent subpoenaed 17 manu-

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[3]See FTC News Releases of May 1, 1963, August 12, 1963, January 3, 1964, March 13, 1964, July 16, 1964, July 29, 1964, August 18, 1964, September 25, 1964, November 18, 1964, January 26, 1965, February 27, 1965, and April 14, 1965. (See RX 23A through RX 26D, inclusive; RX 38, RX 39, RX 40.)

[4]Some testimony places this price range at $60.00-$110.00.

facturers whose competition, it asserted, it was meeting when it made its non-proportionalized cooperative advertising payments in Boston, New York, and Washington, D. C., in 1960 through 1962, inclusive.

This record involves for 1960 through 1962 six favored customers in three cities: In New York City, Lord & Taylor, and Best & Co., Inc.; in Boston, Jordan Marsh, Jay's, Inc., and R. H. Stearns Co.; in Washington, D. C., Woodward & Lothrop, Inc. Although seventeen alleged competitors of respondent were subpoenaed, it is interesting to observe that, as to Jay's, Inc., none of the competitors testified to making advertising payments, and, as to R. H. Stearns Co., only one competitor out of seventeen testified as to making advertising payments; only two competitors testified to payments to Jordan Marsh Co.; and possibly three competitors testified to advertising allowances to Woodward & Lothrop, Inc. Such evidence hardly sustains respondent's assertion that its non-proportionalized advertising payments were responsive to industry-wide non-proportionalized payments to its favored customers.

As part of its meeting competition defense, respondent asserts that non-proportionalized cooperative advertising payments are rampant in, and an integral part of, the modus operandi of the garment industry. Complaint counsel did not contest this assertion. The Federal Trade Commission's investigation alluded to above (see RX 24) found such to be the fact. The fact that the garment industry, as such, is engaged in making non-proportionalized cooperative advertising payments does not exculpate or excuse unlawful payments. The criteria used for evaluating meeting competition as a defense to a 2(a) violation include the caveat that price discrimination is not excused on the

grounds that it is necessary to combat a general discriminatory pricing system.[5]

Moreover, the Federal Trade Commission in *Flotill Products, Inc.*, Docket No. 7226, in its opinion of June 26, 1964, has held:

> But a seller is under an obligation to affirmatively offer or otherwise make available promotional allowances on proportionally equal terms to all customers who compete in the resale of its goods. This obligation entails whatever inquiry is necessary to establish whether customers in fact compete. If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious. A violation of Section 2(d) is determined by objective rather than subjective considerations. If the favored and nonfavored customers actually compete in the resale of the seller's goods, the Act may be violated without regard to the Seller's knowledge of the lawfulness or unlawfulness of a disproportionate promotional allowance. To hold otherwise would recognize the right of a seller to discriminate in favor of or against any customer who conducts his resale operations in more than one trade area.

The Supreme Court has held, in passing upon a meeting competition defense to a 2(a) violation, ". . . The seller

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[5]See *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945); *F.T.C.* v. *Standard Oil Co.*, 355 U. S. 396 (1958); *F.T.C.* v. *Cement Institute*, 333 U. S. 683 (1948); *F.T.C.* v. *National Lead Co.*, 352 U. S. 419 (1957); *F.T.C.* v. *Standard Brands, Inc.*, 189 F.2d 510 (2nd Cir. 1951); *Standard Oil Co.* v. *Brown*, 238 F.2d 54 (5th Cir. 1956); *Standard Oil Co.* v. *F.T.C.*, 340 U. S. 231 (1951); *Corn Products Ref. Co.* v. *F.T.C.*, 324 U. S. 726 (1945).

has the burden of bringing himself within the exculpating provision of § 2(b), . . ." *Federal Trade Commission* v. *Sun Oil Co.*, 371 U. S. 505, 514.

Respondent's meeting competition defense will exculpate its non-proportionalized advertising payments only if such discriminatory payments were made in good faith to meet individual competitive situations. Good faith is not present if a seller adopts the unlawful discriminatory practices of a competitor; good faith is not proven in the record if the seller acts entirely on unsupported, unverified verbal estatements, nor is good faith established if the seller knew or should have known that his competitor's system was unlawful or inherently illegal. (See cases cited in footnote 5, *supra.*)

> Once the threshold applicability of the meeting competition proviso is resolved, the same criteria governing its use in Section 2(a) price discrimination proceedings would apply to Section 2(d) and 2(e) cases. *Rowe, Price Discrimination Under the Robinson-Patman Act* (1962), page 420.

In addition to the testimony of Abbe Rabiner, its president, and representatives of its seventeen alleged competitors, respondent produced as an expert witness Bernard W. Smith, Associate Professor of Retail Merchandising at the Institute of Retail Merchandising, New York University, New York, New York. Among other things, Professor Smith testified to the universality of cooperative advertising payments in the garment business; that students in his classes are taught to demand cooperative advertising payments from manufacturers if they become buyers; that the average life of a coat and suit manufacturer is less than

twenty-five years; that in 1960, 623 firms manufactured women's coats and suits; that by 1963 this number had shrunk to 552, or that 71 firms went out of business between 1960 and 1963; and that the coat and suit business had lost some $18,000,000 in volume, from $698,963,000 in 1960 to $681,000,000 in 1963 (Tr. 948, et seq.; the Apparel Manufacturing Industry's Market Planning Service of the National Credit Office issued by Dun and Bradstreet [RX 28, 29 in evidence]).

Mr. Rabiner testified to the unusual vigor and keenness of the competition in his business, and to the necessity of permitting him to continue his advertising payments so that he may stay in business. Mr. Rabiner asserts that he cannot afford to proportionalize his cooperative advertising payments so as to make them available on proportionally equal terms to all of his customers; and that, if the women's coat and suit business generally were required to proportionalize their cooperative advertising payments, only the "giants" in the industry would be able to survive. It is Mr. Rabiner's contention that the order sought in this proceeding, if made applicable on an industry-wide basis, would encourage an oligopolistic industry pattern contrary to the intent of the Robinson-Patman Act. He asserts that only the "giants", who do a very large dollar volume of business and manufacture many different lines of garments, can afford to proportionalize their cooperative advertising payments.

Although the ladies' coat and suit manufacturing business has, in the aggregate, a substantial dollar volume per annum, other than the "giants" alluded to, it is composed chiefly of small businesses whose individual annual dollar volume is not large. Respondent is considered a substantial concern. Its annual dollar volume exceeds $4,000,000, even though its annual sales volume has not increased to any noticable extent over the last few years.

Professor Smith sought to define competition in the women's coat and suit business in terms of "price lines". The exact nature of competition for the retail customer's dollar spent for $60.00 to $90.00 coats and suits is not precisely delineated nor specifically described in the record. A representative of one of the competitor manufacturers, Modelia, Inc., testified that Modelia uses an "avant garde" styling, and therefore does not compete with the more conventionally styled lines. Several of the firms, who were subpoenaed as "competitors" by respondent, denied that they were competitors in fact.

Where, as here, respondent defends on the grounds that it is meeting competition, the burden of proving the competition, as well as proving the "meeting" of such competition, is upon the party asserting such defense.

Two decisions important to resolving the issues presented in this proceeding were rendered since the record was closed in this proceeding on April 28, 1965. On June 18, 1965, the Federal Trade Commission in *Ace Brooks, Inc., et al.*, Docket No. 8557, affirmed a 2(d) cease and desist order (Opinion, page 18), and, *inter alia*, held:

> It has been recognized that the burden of establishing the Section 2(b) defense is upon the proponent. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U. S. 505 (1963). Since the defense has the effect of exculpating a discrimination which would otherwise be forbidden, the evidence upon which the defense is predicated must be of sufficient preciseness to permit an informed determination. See *Callaway Mills Co.*, Docket No. 7634, F. T. C. (February 10, 1964); *Cabin Crafts, Inc.*, Docket No. 7639, F. T. C. (February 10, 1964);

cf. Continental Baking Co., Docket No. 7630, F. T. C. (December 31, 1963); *Ponca Wholesale Mercantile Co.*, Docket No. 7864, F. T. C. (February 24, 1964). We think the evidence presented here does not permit such a determination. The evidence does not show when respondents' competitors began granting allowances . . . or when respondents themselves initiated the practice. The record fails to establish the rates used by respondents' competitiors to compute their allowances or the amounts of such allowances. . . . Respondents failed to show any of the circumstances surrounding the initiation of their allowances to these retailers and made no effort to establish that their allowances did not in fact exceed those of competitors, by reference either to the rates or the total amounts of these allowances. Without evidence of a more specific nature, the Commission is unable to make an informed determination on the various questions which must be resolved and, as a result, is compelled to reject respondents' contention that they have met their burden in establishing the defense.

On July 2, 1965, the United States Court of Appeals for the District of Columbia Circuit in *Exquisite Form Brassiere, Inc., et al.* v. *Federal Trade Commission*, No. 18524, F.2d , in an appeal from an opinion of the Federal Trade Commission upon remand (see *supra*, 301 F.2d 499 (1961), affirmed the opinion of the Commission finding that *Exquisite* had, upon remand, failed to prove its meeting competition defense. *Inter alia*, the Court of Appeals held:

Exquisite Form in the present case essentially premises its position upon the proposition that in a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a system or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phases the matter, is the crux of the case. Admittedly the Supreme Court has held[4] that in a price discrimination case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases a plan to combat other plans is not an effective defense under the proviso in Section 2(b). The Court held that in such cases the combative act had to be a specific act aimed at a lower price on the part of a competitor in "individual competitive situations, rather than * * * [in] a general system of competition." Exquisite Form argues that that rule cannot apply to the advertising allowance practices in the brassiere industry, because of the factual characteristics of that industry and the practices in it.

We think the doctrine of *Staley* must be applied here. There are differences, of course, between a price discrimination (Section 2(a)) case and a case involving advertising allowances. But we are not shown that any such difference goes to the basic

[4]FTC v. A. E. Staley Co., 324 U. S. 746 (1945).

thesis involved in the statute or to the rationale of *Staley*. We are not shown any compelling reason for different treatment.

Exquisite Form also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the dates of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission.

In view of this recent decision by the Court of Appeals, it is only necessary to apply "the rationale of Staley" to the record in this proceeding.

Prehearing conferences in this matter were held in New York, New York, on September 21, 22 and 25, 1964; in Washington, D. C., on November 4 and December 8, 1964, and on January 21, 1965. Evidentiary hearings were held in New York, New York, on February 15-18, and March 16-22, 30, 1965; April 1-2, 26, 1965; and were concluded on April 27, 1965.

Proposed findings, conclusions, and briefs have been filed. The hearing examiner heard and observed the witnesses in the hearing room and on the witness stand. He observed their demeanor and their manner of answering questions. He has considered the reliability, credibility and probative value of the witnesses' testimony in making his findings of fact, as well as their respective interest in the outcome of this proceeding. Proposed findings not made

herein in the form proposed, or in substantially that form, are rejected. Any motions heretofore made and not previously ruled upon are denied. The undersigned hearing examiner has carefully considered the entire record, including the exhibits, pleadings, and the testimony of the witnesses. Based upon the entire record in this proceeding, the hearing examiner makes the following:

FINDING OF FACT

Respondent, Rabiner & Jontow, Inc., a New York corporation since 1942, with its office and principal place of business at 512 Seventh Avenue, New York, New York, has, since its incorporation, traded under the names of Finger, Rabiner & Jontow, Inc., Finger & Rabiner, Inc., and presently as Rabiner & Jontow, Inc. (Answer; Tr. 26, 29, 39). Respondent is now, and has been, since its incorporation, engaged in manufacturing and selling, in interstate commerce, ladies' suits and coats to retail specialty and department stores throughout the United States under the trade names of "Bardley", "Bardley, Jr.", and under private labels. Respondent's sales exceeded $4,000,000 annually during the period involved in this proceeding (Tr. 30-31). Respondent has been under the same management, basically, since it commenced business, and its policy with reference to payment of cooperative advertising allowances has been unchanged (Tr. 50). Respondent's garments retail at a price range from $70.00 to $90.00[6] (Tr. 30), and are designed primarily for spring and fall sale. Its coats are not fur trimmed.

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[6]At Tr. 909, respondent's expert, Professor Bernard W. Smith, testified that he had been advised that respondent's retail prices range from $60.00 to $110.00. These are the figures in respondent's proposed findings (p. 2, par. 4).

Respondent's garments may be described as updated classic tailored clothes, and not a high style line (Tr. 31-32). (See also the advertisements in CX 10, CX 11, CX 12 [p. 7], CX 13, CX 14B.) It sells its products only to retailers, primarily through its showroom at 512 Seventh Avenue, New York City, which is visited by buyers representing these retailers. Traveling salesmen are not generally utilized by respondent (Tr. 31, 62-63). Abbe Rabiner, respondent's president since its incorporation, has general responsibility for sales, and Mr. Jontow has responsibility for general internal management. Respondent usually has four sales persons, in addition to Mr. Rabiner, in its showroom.

Mr. Rabiner has had primary responsibility for respondent's policies relating to its advertising and promotion policies. The granting of advertising allowances has been a company policy since the company was organized (Tr. 50).

Respondent causes its products, when sold, to be shipped from its factory in New Jersey to customers located in other states of the United States and in the District of Columbia. Respondent has, at all relevant times, maintained a course of trade in its products in commerce, as "commerce" is defined in the Clayton Act, as amended.

The Federal Trade Commission had jurisdiction over the parties to, and the subject matter of, this proceeding. This proceeding is in the public interest.

In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation for or in consideration of services or facilities furnished by or through such customers in connection with the offering for sale or sale of respondent's products (Tr.

36-37; CX 4A-CX 7; Prehearing Stipulation and Order dated November 4, 1964, p. 5, par. 2).

By agreement, the evidence in this proceeding has been limited to the years 1960 through 1962, inclusive, and to the cities of Boston, Massachusetts, New York, New York, and Washington, D. C. During these years and in these cities, respondent paid promotional advertising allowances to some of its customers without making such advertising allowances available on proportionally equal terms to all of its customers competing in the sale, at retail, of respondent's products of like grade and quality. Respondent's sales and advertising allowances paid to its favor (F) and nonfavored (N) customers were:

In New York, New York:

Customer	Sales	Advertising Paid
	1960	
(F) Best & Co.	$836,850.00	$28,722.50
(F) Lord & Taylor	192,915.00	2,762.67
(N) B. Altman	14,259.00	None
	1961	
(F) Best & Co.	651,212.00	23,833.50
(F) Lord & Taylor	184,392.00	3,350.00
(N) B. Altman	25,572.00	None
(N) Bonwit Teller	67,338.00	None
	1962	
(F) Best & Co.	641,024.00	35,351.82
(F) Lord & Taylor	104,141.00	3,053.14
(N) B. Altman	23,916.00	None

(Complaint and Answer; CX 24 *in camera*)

In Boston, Massachusetts:

	1960		1961	
	Sales	Advertising Paid	Sales	Advertising Paid
(F) R. H. Stearns Co.	$32,165.00	$549.90	$21,790.00	$ 500.00
(F) Jay's	31,739.00	400.00	25,738.00	600.00
(F) Jordan Marsh	16,323.00	None	32,718.00	2,200.00
(N) Chas. Sumner, Inc.	2,586.00	None	2,216.00	None
(N) House of Tweed, Inc.	728.00	None	1,209.00	None
(N) Delano's	200.00	None	6,272.00	None
(N) Worth, Inc. (Worth's) ..	2,829.00	None	4,370.00	None
(N) Leeds, Inc.	3,541.52	None	456.80	None
(N) C. Crawford Hollidge	25,760.00	None	10,719.00	None
(N) Wm. Filene's Sons (Filene's)	9,937.00	None	8,661.00	None

(Complaint and Answer; CX 24 *in camera*)

In Washington, D. C.:

	1960		1961	
	Sales	Advertising Paid	Sales	Advertising Paid
(F) Woodward & Lothrop	$55,270.00	$3,520.78	$36,919.00	$1,419.91
(N) Raleigh Haberdasher	2,590.00	None	5,365.00	None
(N) Dorothy Stead, Inc.	1,688.00	None	847.00	None
(N) Mary Elizabeth Gowns, Inc.	None	None	460.00	None
(N) Jane Dawson Smith	701.00	None	562.00	None
(N) Jenny Shoppe	883.00	None	263.00	None

(Complaint and Answer; CX 24 *in camera*)

In New York City, respondent's payments to Best & Co., Inc. in 1960 approximated 3.43% of sales; whereas, its payments to Lord & Taylor were 1.43% of sales. In 1961, respondent's payments to Best & Co., Inc. were 3.66% of sales; and to Lord & Taylor, 1.82% of sales. In 1962, the payments or allowances to Best & Co., Inc. approximated 5.51% of sales; and to Lord & Taylor, 2.93% of sales.

In Boston, Massachusetts, the 1960 payments to R. H. Stearns Co. were approximately 1.71% of sales; and to Jay's, Inc., 1.26% of sales. In 1961, the payments to R. H. Stearns Co. were 2.29% of sales; to Jay's, Inc., 2.57% of sales; and to Jordan Marsh Co., 6.72% of sales.

Abbe Rabiner, president of respondent, testified, and it is hereby found, that respondent's advertising payments were individually negotiated on an *ad hoc* basis for each advertisement. Respondent promulgated no plan which set forth the procedure by which its customers might qualify for an advertising allowance. Respondent's payments were not made available on proportionally equal terms even to the favored customers (Tr. 46).

Pursuant to Prehearing Stipulation and Order, dated November 4, 1964 (p. 6, par. 3), it is found that respondent's nonfavored customers did not receive *any* advertising or promotional allowances during the relevant years in the cities in question.

Respondent sold goods of like grade and quality to both its favored and nonfavored customers during the years in question in New York City, Boston, and Washington, D. C. Respondent's favored customers competed in the sale, at retail, of respondent's garments with respondent's nonfavored customers. (Prehearing Stipulation of November 4, 1964,

p. 5, par. 1.) The favored customers competed with other favored customers.

It was stipulated, and it is hereby found, that during the relevant years, and in the cities involved, if respondent's nonfavored customers were called as witnesses, they would testify that they were neither offered nor paid advertising or promotional allowances in connection with their purchases for resale of respondent's garments. The Prehearing Stipulation and Order dated January 6, 1965, filed January 21, 1965, names the following customers and witnesses who would so testify:

WASHINGTON, D. C.

Customer	*Witness*
Raleigh Haberdasher	Arthur Levy, Buyer
Dorothy Stead, Inc.	Robert Stead, Vice Pres. & Treasurer Dorothy Stead, President
Mary Elizabeth Gowns, Inc.	Georgia Hayes McClerkin, President Isabelle Henry, Manager
Jane Dawson Smith	Carl Dawson Smith, Partner Jane Dawson Smith, Partner
Jenny Shoppe	Cabot Feldman, Proprietor Lisa Matusek, Buyer

BOSTON, MASSACHUSETTS

Customer	*Witness*
Charles Summer, Inc.	Summer Goldman, Treasurer
House of Tweed, Inc.	Helen Hunt, Manager
Delano's	Merrill Delano, President
Worth, Inc.	Joseph Worth, Treasurer

Customer	
Leeds, Inc.	Florence Rubenstein, Buyer
C. Crawford Hollidge	Grace McNeeley, Buyer
Wm. Filene's & Sons	F. B. Gummere, Asst. to President

NEW YORK, NEW YORK

Customer	*Witness*
B. Altman & Co.	Rudolph Van Gytenbeek, Vice Pres. Barbara Mussett, Buyer Wendy Wardrop, Buyer
Bonwit Teller, Inc.	George Baylis, Vice Pres. (Stipulation limited to years 1960 and 1961 only)

Respondent's procedure for selecting customers for co-operative advertising payments was described by Mr. Rabiner:

> Q. Mr. Rabiner, would you tell me how you selected particular customers to whom advertising allowances were paid during those years?
>
> A. This was based purely on the competition that existed with those customers . . . from firms that manufactured similar goods and where these people offered similar offerings of advertising . . . we did the same thing as our competitors did.
>
> Q. Why is it, Mr. Rabiner, that, as the record shows, allowances were given to certain customers and not paid to others?
>
> A. Well, when certain of these customers that you refer to came to me and I knew for a fact that they used the forms of media to advertise ready-to-wear—speci-

ficially, our product—and similar merchandise, I naturally worked along with them. Others who did not come to me, . . . so I didn't do anything with them (Tr. 79-80).

Q. Are you saying, then, that you gave allowances only to those customers who came to you?
A. I would say so, pretty much (Tr. 80).

Concerning the payment of allowances for mailing pieces, Mr. Rabiner testified:

Q. In other words, this was a practice which was limited to those stores who had achieved a certain important position with you that engaged in that practice?
A. That is correct (Tr. 101).
Q. And those who didn't have that as a store policy never worked out any such plan for the use of such mailing pieces?
A. To the best of my knowledge, no (Tr. 102).

* * *

Q. In other words, there is a distinction, therefore, that you are bringing out between certain kinds of retailers who engage in certain practices with whom you worked out programs and those who never engaged in those practices with whom you never worked out any program?
A. That is correct (Tr. 102).

* * *

If I had to make the same offer to everybody, there isn't enough money not only in my business, but in the whole cloak and suit industry for me to

> do it. I cannot make the same offer to everybody (TR. 1126).
>
> * * *
>
> . . . I try to be as prudent and as careful as I possibly can with the expenditures of my money. Consequently, it becomes very important to us to have the best exposure for our product throughout the country, and in that case it behooves us to choose the particular retailers with whom we feel we can get the best exposure (Tr. 1127-28).

In addition to the testimony of Mr. Rabiner, respondent proffered the testimony of seventeen coat and suit manufacturers, who, it asserted, but did not prove, were its competitors. It is the competition of these seventeen other manufacturers that respondent claimed, but failed to prove, it was meeting. Respondent also proffered the testimony of an expert witness, Bernard W. Smith (Tr. 897-1020), who was an associate professor of retail merchandising at New York University. Professor Smith testified as to the general business conditions and practices in that segment of the garment industry of which respondent is a part—the manufacturers of women's coats and suits.

When pressed to name specifically the competitors, whose allowances it was meeting, respondent was unable to name any (Tr. 99-100).

The practice of paying non-proportionalized, cooperative advertising allowances had been part of the pattern of doing business in the garment industry for years.[7]

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[7]See RX 23A-23M; RX 24A-24H; RX 25A-25B; RX 26A-26D, all of which are FTC News Releases, plus FTC New Releases on the same subject issued on March 13, 1964, July 16, 1964, August 18, 1964, November 18, 1964, January 26, 1965, February 27, 1965, and April 14, 1965.

Respondent's cooperative advertising allowances were part of its regular method of doing business and part of its selling techniques, and had been used by respondent ever since it started in business.

RX 32, RX 33, RX 34, RX 35 and RX 36 are copies of a publication entitled "Coatvertising Weekly", and contain reproductions of nationwide coat and suit advertisements appearing in various publicity media. These are 1965 advertisements, but constitute specimens of cooperative advertising which is involved in this proceeding.

The record does not contain any evidence that respondent's cooperative advertising allowances were paid by respondent to meet or match a similar payment by a specifically named competitor who, at the time, was selling competing merchandise to respondent's favored customer. Mr. Rabiner's testimony negates a finding that respondent's cooperative advertising payments were made to meet or match a similar payment made by a competitor. Counsel for respondent has emphasized throughout this record that respondent's cooperative advertising payments were not made in conformity with a "plan", either oral or written.

From its inception, in connection with the sale of its products, at retail, under the trade name "Bardley" or "Bardley, Jr.", respondent paid a portion of the cost of advertisements of its products which its retail customers ran in newspapers, national fashion magazines, store catalogues, direct mailers, and bill enclosures (Tr. 52), " . . . generally on a fifty-fifty basis, at times a little bit more or less on either side" (Tr. 49, 55). Mr. Rabiner and the particular retail customer (i.e., Best & Co., Inc., Lord & Taylor, R. H. Stearns Co., Jay's Inc., Jordan Marsh Co., or Woodward & Lothrop, Inc.) jointly decided whether

the advertisement would appear in a newspaper (i.e., New York Times or New York Herald Tribune) or fashion Magazine (i.e., MADEMOISELLE, HARPER'S BAZAAR or GLAMOUR) (Tr. 49-50). There was no radio or television advertising (Tr. 51). Usually the retail establishment and the trade name, "Bardley", were named in the ad (Tr. 51).

There was no real formula or yardstick by which to determine how much of an allowance would be paid by respondent to a favored customer (Tr. 53). "[I]t was based primarily upon the competition that existed within the firms what we did business with" (Tr. 53). Likewise, there was no mathematical formula which related the advertising allowance to the amount of merchandise purchased (Tr. 54). Each time that Mr. Rabiner negotiated an advertising allowance, all of the elements of the advertising promotion were individually negotiated between Mr. Rabiner and his customer, including the determination as to which one of respondent's products would be advertised (Tr. 54).

Respondent confined the sales of its products "to those quality stores that stand for the kind of product that we produce . . ." (Tr. 56). Respondent considers that it makes a quality product and tries to sell to retail establishments which, in the public's mind, sell quality products (Tr. 57-58). In any given area, respondent has a few carefully selected customers which meet this requirement (Tr. 58). Respondent does not sell to other than retailers (Tr. 63).

The favored customers to whom respondent paid its advertising allowances were "For the most part, people I had been doing business with for years, . . . for as many as twenty and twenty-one years" (Tr. 1123). The advertising payments by respondent in the cities and during the years

involved represented the continuation of a business practice that respondent had followed for years (Tr. 1123).

In his testimony, Mr. Rabiner emphasized that, if respondent were to make its advertising payments available on proportionally equal terms to all its customers, "there isn't enough money not only in my business, but in the whole cloak and suit industry for me to do it. I cannot make the same offer to everybody" (*supra,* p. 19; Tr. 1126). He testified further that within the present framework of the women's coat and suit business only "A Bobbie Brooks kind of organization, a Jonathan Logan . . ." (i.e., firms with large sales volumes and broad product lines) can afford to offer a proportionalized advertising allowance (Tr. 1127). Respondent's evidence on this part of its defense is inconclusive.

It may well be that manufacturers of ladies' coats and suits, being for the the most part small businessmen, cannot afford to make their cooperative advertising payments available to all their customers on proportionally equal terms. It is possible, although not herein found, that the advertising practices delineated in this record, even though unlawful within the caveat of Section 2(d) of the Robinson-Patman Act, may not have had the effect, to date, of lessening competition; creating a monopoly; or injuring, destroying, or preventing competition. Complaint counsel are not required in this 2(d) proceeding to prove an anti-competitive effect in the same manner as would be required if this were a 2(a) proceeding. Complaint counsel have sustained their burden of proof. Indeed, respondent admits that is advertising payments were not proportionalized—made available to all its competing customers on proportionally equal terms—and that respondent's favored and

nonfavored customers did, and do, in fact, compete in the sale at retail of respondent's products of like grade and quality.

In the ladies' coat and suit industry, as in other apparel trades, there is increasing concentration (Tr. 1096). ". . . In 1950 some 8,500 manufacturers sold $7½ billion worth of apparel. By the end of '63 the number of companies had shrunk by 2,000 or more—while dollar volume had passed the $11 billion mark . . . side by side with a sharp drop in the number of coat and suit firms, there has been an increase in unit output and dollar volume of business. Together, these facts add up to one conclusion: more concentration of business."[8]

Respondent has failed to prove, in spite of its legal burden to do so, that its non-proportionalized advertising payments to its favored customers were made in order to meet specific, individual, competitive situations. The Court of Appeals' recent decision in *Exquisite Form Brassiere, Inc., et al.* emphasizes the necessity for such proof (*supra*, pp. 9-10). Respondent relied upon the generalized testimony of Abbe Rabiner (Tr. 50, 79, 82-83, 85-86, 88), and its expert, Professor Bernard W. Smith (Tr. 897, et seq.), for proof of the competitive conditions within its industry. Respondent did not proffer the testimony of any of its customers, favored or nonfavored, to prove which were considered by respondent's customers to be respondent's competitors. Professor Smith's testimony (Tr. 908, et seq.) does not help respondent to demonstrate that its non-proportionalized advertising payments were "a specific act aimed at a . . . competitor in 'individual competitive situa-

[8]RX 30, pp. 5-6, Cloak Joint Board, I. L. G. W. U. Report of the General Manager, dated March 20, 1965.

tions, rather than * * * [in] a general system of competition.'" (See *Exquisite Form Brassiere, Inc., et al., supra,* p. 10.) Professor Smith, *inter alia,* testified (Tr. 908-913):

> A. [As a general rule]—each store has a clientele which is based, to a large extent, on the income groupings of the people who shop in the store. Thus, we have some stores that cater to lower-middle income groups, some to upper income groups, and some to the wealthy people.
>
> The prices that the stores set will correspond with the ability of each income group to pay. These prices are usually set in what we call price zones. In other words, we find that certain customers will shop in pricing areas, let us say, from forty to sixty dollars, or from sixty to eighty, or eighty to one hundred.
>
> In other words, a customer of a certain income group, coming into a store, may buy something at sixty dollars, may intend to buy something at sixty, and actually go out with something at seventy dollars, or vice versa: she may go in thinking to buy something for seventy, and find something that she likes at sixty.
>
> So, therefore, stores usually price merchandise in what we call price zones, and then pick a particular price in the price zone on which they specialize for one reason or another. The special price is called the price line, while the zone is the range of prices in which they operate.
>
> Q. Would you have occasion to receive information concerning the retail prices at which goods of

Rabiner and Jontow were sold during the years 1961 and 1962?

A. Yes. I made inquiries about that. I have found, or I have been advised, that their prices ranged from sixty to $110 at retail.[9]

Q. On the basis of your knowledge and experience, what type of stores would handle merchandise of that quality and price line?

A. Well, actually, the better departments of Gimbel's, Macy's, Lord and Taylor, Altman's, Saks—

HEARING EXAMINER GROSS: You mean Saks 34th or Saks Fifth?

THE WITNESS: No, Saks Fifth—although even Saks 34th would handle the lower end of those prices; they would go in the sixty-dollar price.

In other words, the prices, the top prices of the popular stores, would over lap the low prices of the better stores. So that actually most of the big department stores in New York and specialty stores in New York would handle those price ranges.

By Mr. Feldman:

Q. Could you tell us what retail price lines of merchandise would compete with the price lines of Rabiner and Jontow which you have just testified to?

A. Well, I would say that any merchandise from about $49 to $125 would be in competition with that range of merchandise.

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[9]This contradicts Mr. Rabiner's testimony. (See footnote, *supra*, p. 12.)

> Q. These price zones are established practices and principles of retailing in this country which you have just testified to, the use of price zones?
>
> A. I don't know whether the word "established" is the right word. They are practices, because *different stores will have their own definitions of "price zones."*
>
> * * *
>
> Q. But *the principle of prize zones would vary from different types of stores, wouldn't it?*
>
> A. That's right. (Underscoring supplied.)

Included in this initial decision are six charts which constitute a finding or resume, in abbreviated form, of the evidence elicited by respondent from its seventeen "competitor" witnesses concerning these competitors' sales and allowances on cooperative advertising payments to respondent's favored customers. Usually, the testimony does not contain the exact dollar amount of such competitors' sales and advertising payments to respondent's favored customers.

Respondent's competitors were understandably non-cooperative. They vigorously resisted revealing any more of their confidential business information than was absolutely essential. In some instances, such competitors had made a full report to the Federal Trade Commission concerning their advertising practices. Some had negotiated consent agreements with the Commission; others were in the process of doing so. None of respondent's competitors, individually, paid to respondent's favored customers the large cooperative advertising allowances that respondent paid.

LORD & TAYLOR

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References	1962 Sales	1962 Allowances	1962 References
Glenhaven, Ltd.	$15,059.12	$ 35.00	RX 20A, Tr. 160, 162	$13,383.27	$ None	RX 20A, Tr. 162	$46,668.55	$ 238.03	RX 20A, Tr. 165-166, 162
Buddy Bates Corp.	Yes	None	Tr. 218, 219	Yes	None	Tr. 218, 219	Yes	None	Tr. 218, 219
Barberini, Ltd.	None	None	Tr. 196, 199	None	None	Tr. 196, 199	None	None	Tr. 196, 199
Suitmaster Classics, Inc.	Yes	None	Tr. 249, 250	Yes	None	Tr. 249, 250	Yes	None	Tr. 249, 250
Lumay Coat Company, Inc.	29,000.00	None	Tr. 322, 316	42,000.00	None	Tr. 322, 316	90,000.00	202.00	Tr. 322, 316-318
Modelia, Inc.	Yes	6,700.00 for 3 years	Tr. 355	Yes	6,700.00 for 3 years	Tr. 355	Yes	6,700.00 for 3 years	Tr. 355
Townsliffe, Inc.	Yes	1,945.20	Tr. 394, RX 9D	Yes	2,952.77	Tr. 394, RX 9D	Yes	831.60	Tr. 394
Zelinka-Matlick, Inc.	Yes	None	Tr. 435, 437 448	Yes	None	Tr. 435, 437 448	Yes	None	Tr. 435, 437 448
David Crystal, Inc.	Yes	None	Tr. 624, 627 RX 13A-J	Yes	1,317.00	Tr. 624, 627 RX 13D, I	Yes	750.00	Tr. 624, 627 RX 13F
Briarbrook, Inc.	Exact Amount Not In Record	211.00	Tr. 589, RX 12	Exact Amount Not In Record	None	Tr. 589, RX 12	Exact Amount Not In Record	207.37	Tr. 589, RX 12
Cuddle Coat, Inc.	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	5,606.68	Tr. 657, RX 19	Yes	3,356.70	Tr. 657, RX 19	Yes	7,828.88	Tr. 657, RX 19
Linker & Company	Yes 1/	None	Tr. 714	Yes 1/	None	Tr. 714	Yes 1/	None	Tr. 714
Devonbrook, Inc.	None	None	Tr. 786, RX 21	None	None	Tr. 786, RX 21	None	None	Tr. 786, RX 21
Handmacher-Vogel, Inc.	Yes	2,191.49	Tr. 507, RX 11A	Yes	745.58	Tr. 507, RX 11A	Yes	632.98	Tr. 507, RX 11A
Country Tweeds, Inc.	Yes	2/	Tr. 1159, Tr. 1168	Yes	4,299.99	Tr. 1159, 1167, 1174	Yes	4,814.72	Tr. 1159, 1167, 1174
Jack Feit, Inc.	Yes	2/	Tr. 1199, 1194	Yes	3,783.95 for 1961 & 1962	Tr. 1199	Yes	3,783.95 for 1961 & 1962	Tr. 1199

1/ Total sales by Linker & Company to Lord & Taylor for the entire period was approximately $15,000.
2/ No figures for 1960.

* Exhibits which are underlined were received "In Camera".

BEST & CO.

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References	1962 Sales	1962 Allowances	1962 References
Glenhaven, Ltd.	$ None	$ None	Tr. 131, 145, RX 20A, B	$ None	$ None	Tr. 131, 145, RX 20A, B	$ None	$ None	Tr. 131, 145, RX 20A, B
Buddy Bates Corp.	None	None	Tr. 218	None	None	Tr. 218	None	None	Tr. 218
Barberini, Ltd.	None	None	Tr. 196, 199	None	None	Tr. 196, 199	None	None	Tr. 196, 199
Suitmaster Classics, Inc.	None	None	Tr. 249	None	None	Tr. 249	None	None	Tr. 249
Lumay Coat Company, Inc.	None	None	Tr. 321	None	None	Tr. 321	None	None	Tr. 321
Modelia, Inc.	Yes	350.00	Tr. 355, 370,	Yes	None	Tr. 355, 370	Yes	None	Tr. 355, 370
Townecliffe, Inc.	Yes	1,200.00	Tr. 394, 396, RX 9C	Yes	2,847.00	Tr. 394, 396, RX 9C	Yes	1,950.00	Tr. 394, 396
Zelinka-Matlick, Inc.	None	None	Tr. 437, 448	None	None	Tr. 437, 448	None	None	Tr. 437, 438
Handmacher-Vogel, Inc.	None	None	Tr. 504-505, 526, RX 11	None	None	Tr. 504-505, 526, RX 11	None	None	Tr. 504-505, 526, RX 11
David Crystal, Inc.	Yes	6,250.38	Tr. 624, RX 14A-Z 10	Yes	6,184.00	Tr. 624, RX 15A-Z 10	Yes	7,409.50	Tr. 624, RX 16A-Z 2
Briarbrook, Inc.	1/	None	Tr. 589, RX 12, RX 31	1/	None	Tr.589, RX 12, RX 31	1/	None	Tr. 589, RX 12, RX 31
Cuddle Coat, Inc.	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743
Davidow Suits, Inc.	None	None	Tr. 659	None	None	Tr. 659	None	None	Tr. 659
Linker & Company	None	None	Tr. 714	None	None	Tr. 714	None	None	Tr. 714
Devonbrook, Inc.	68,000.00 2/	7,750.00 3/	Tr. 787, 800, RX 21	74,000.00 2/	11,100.00 3/	Tr. 787, 800, RX 21	74,000.00 2/	8,650.00 3/	Tr. 787, 800, RX 21
Country Tweeds, Inc.	Yes	None	Tr. 1159, 1168	Yes	None	Tr. 1159, 1168	Yes	None	Tr. 1159, 1168
Jack Feit, Inc.	None	None	Tr. 1198, 1199	None	None	Tr. 1198, 1199	None	None	Tr. 1198, 1199

1/ No evidence relating to sales to Best & Co.
2/ Sales to Best & Co. by Devonbrook, Inc. only.
3/ Advertising allowances to Best & Co. by Devonbrook, Inc. and all its affiliates.

* Exhibits which are underlined were received "In Camera".

JAY'S

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References
Glenhaven, Ltd.	$ None	$ None	Tr. 145, 157, RX 20A, B	$ None	$ None	Tr. 145, 157, RX 20A, B
Buddy Bates Corp.	None	None	Tr. 218, 258	None	None	Tr. 218, 258
Barberini, Ltd. 1/	-	-	-	-	-	-
Suitmaster Classics, Inc.	None	None	Tr. 249, 250	None	None	Tr. 249, 250
Lumay Coat Company, Inc.	None	None	Tr. 318-319, 322	42,000.00	None	Tr. 318-319, 322
Modelia, Inc.	None	None	Tr. 372, 374	None	None	Tr. 372, 374
Towncliffe, Inc.	2/	None	Tr. 423	2/	None	Tr. 423
Zelinka-Matlick, Inc.	Yes	None	Tr. 437, 438, 448	Yes	None	Tr. 437, 438, 448
Handmacher-Vogel, Inc.	None	None	Tr. 504-505, 526, RX 11A	None	None	Tr. 504-505, 526, RX 11A
David Crystal, Inc.	2/	None	Tr. 637, RX 13A-J	2/	None	Tr. 637, RX 13A-J
Briarbrook, Inc.	2/	None	Tr. 588-589, RX 31	2/	None	Tr. 588-589, RX 31
Cuddle Coat, Inc.	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	None	Tr. 659-660	Yes	None	Tr. 659-660
Linker & Company	2/	None	Tr. 714	2/	None	Tr. 714
Devonbrook, Inc.	2/	None	RX 21	2/	None	RX 21
County Tweeds, Inc.	Yes	None	Tr. 1159, 1169	Yes	None	Tr. 1159, 1169
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

1/ Barberini, Ltd. was not in business during 1960 and 1961.
2/ No evidence relating to sales to Jay's

* Respondent's exhibits which are underlined were received "In Camera".

R. H. STEARNS COMPANY

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References
Glenhaven, Ltd.	$ None	$ None	Tr. 145, 157, RX 20A, B	$ None	$ None	Tr. 145, 157, RX 20A, B
Buddy Bates Corp.	None	None	Tr. 218, 258	None	None	Tr. 218, 258
Barberini, Ltd. 1/	-	-	-	-	-	-
Suitmaster Classics, Inc.	None	None	Tr. 249, 250	None	None	Tr. 249, 250
Lumay Coat Company	800.00	None	Tr. 318-319, 321	None	None	Tr. 318-319, 321
Modelia, Inc.	None	None	Tr. 372	None	None	Tr. 372
Towncliffe, Inc.	2/	None	Tr. 423	2/	None	Tr. 423
Zelinka-Matlick, Inc.	Yes	None	Tr. 438, 448	Yes	None	Tr. 438, 448
Handmacher-Vogel, Inc.	None	None	Tr. 504, 526, RX 11A	None	None	Tr. 504, 526, RX 11A
David Crystal, Inc.	2/	None	Tr. 624-625, 637-640	2/	None	Tr. 624-625, 637-640
Briarbrook, Inc.	2/	None	Tr. 588-589, RX 31	2/	None	Tr. 588-589, RX 31
Cuddle Coat, Inc.	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	1559.10	Tr. 659, 662, RX 17	Yes	1339.60	Tr. 659, 662, RX 17
Linker & Company	Yes	None	Tr. 714, 721	Yes	None	Tr. 714, 721
Devonbrook, Inc.	2/	None	RX 21	2/	None	RX 21
Country Tweeds, Inc.	Yes	None	Tr. 1159, 1169	Yes	None	Tr. 1159, 1169
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

1/ Barberini, Ltd. was not in business during 1960 and 1961.
2/ Evidence of dollar amount of sales to R. H. Stearns, if any, not in record.

* Exhibits which are underlined were received "In Camera".

JORDAN MARSH COMPANY

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References
Glenhaven, Ltd.	$20,541.94	$ None	Tr. 145, 164, RX 20A, B	$34,434.90	$ None	Tr. 145, 164, RX 20A, B
Buddy Bates Corp.	17,500.00	None	Tr. 256, 258	6,000.00	None	Tr. 256, 258
Barberini, Ltd. 1/	-	-	-	-	-	-
Suitmaster Classics, Inc.	9,000.00	None	Tr. 250	25,000.00	100.00	Tr. 250, RX 7
Lumay Coat Company, Inc.	None	None	Tr. 318-320	None	None	Tr. 318-320
Modelia, Inc.	Yes	None	Tr. 372	Yes	None	Tr. 372
Townecliffe, Inc.	2/	None	Tr. 423	2/	None	Tr. 423
Zelinka-Matlick, Inc.	Yes	None	Tr. 448, 438	Yes	None	Tr. 448, 438
Handmacher-Vogel, Inc.	None	None	Tr. 526, 504, RX 11A	Yes	None	Tr. 526, 504, RX 11A
David Crystal, Inc.	2/	None	Tr. 624-625, 637-640	2/	None	Tr. 624-625, 637-640
Briarbrook, Inc.	2/	150.00	Tr. 589, RX 12, RX 31	2/	None	Tr. 589, RX 12, RX 31
Cuddle Coat, Inc.	None	None	Tr. 729, 735, 743	None	None	Tr. 729, 735, 743
Davidow Suits, Inc.	Yes	None	Tr. 659-660	Yes	None	Tr. 659-660
Linker & Company	2/	None	Tr. 714	2/	None	Tr. 714
Devonbrook, Inc.	Yes	None	Tr. 787, RX 21	Yes	None	Tr. 787, RX 21
Country Tweeds, Inc.	Yes	3/	Tr. 1159, 1168	Yes	6,700.00	Tr. 1159, 1169
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

1/ Barberini, Ltd. was not in business during 1960 and 1961.
2/ Evidence of dollar amount of sales to Jordan Marsh not in record.
3/ No figures available for 1960.

* Exhibits which are underlined were received "In Camera".

WOODWARD & LOTHROP

Manufacturer	1960 Sales	1960 Allowances	1960 References	1961 Sales	1961 Allowances	1961 References
Glenhaven, Ltd.	$36,349.52	$ 100.00	Tr. 164, RX 20A	$44,010.60	$ None	Tr. 164, RX 20A
Buddy Bates Corp.	1,500.00	None	Tr. 257-258	700.00	None	Tr. 257-258
Barberini, Ltd. 1/	-	-	-	-	-	-
Suitmaster Classics, Inc.	Yes	None	Tr. 249, 250	Yes	None	Tr. 249, 250
Lumay Coat Company, Inc.	None	None	Tr. 318-319, 321	None	None	Tr. 318-319, 321
Modelia, Inc.	Yes 2/	None	Tr. 378, 379	Yes 2/	None	Tr. 378, 379
Townscliffe, Inc.	None	None	Tr. 422	None	None	Tr. 422
Zelinka-Matlick, Inc.	Yes	None	Tr. 437, 438, 448	Yes	None	Tr. 437, 438, 448
Handmacher-Vogel, Inc.	None	None	Tr. 504-505, 526, RX 11A	None	None	Tr. 504-505, 526, RX 11
David Crystal, Inc.	None	None	Tr. 612, 624-625, 637-640	None	None	Tr. 612, 624-625, 637-640
Briarbrook, Inc.	3/	None	Tr. 588-589, RX 31	3/	None	Tr. 588-589, RX 31
Cuddle Coat, Inc.	Yes	None	Tr. 729, 735, 743	Yes	None	Tr. 729, 735, 743
Davidow Suits, Inc.	None	None	Tr. 659	None	None	Tr. 659
Linker & Company	None	None	Tr. 714, 722	None	None	Tr. 714, 722
Devonbrook, Inc.	22,000.00	None	Tr. 787, RX 21	6,000.00	None	Tr. 787, RX 21
Country Tweeds, Inc.	Yes	4/	Tr. 1159	Yes	1,190.23	Tr. 1159, 1168
Jack Feit, Inc.	Yes	None	Tr. 1198, 1199	Yes	None	Tr. 1198, 1199

1/ Barberini, Ltd. was not in business during 1960 and 1961.
2/ Total volume of sales to Woodward & Lothrop for the entire period was $45,150.00
3/ No evidence relating to sales to Woodward & Lothrop.
4/ No figures available for 1960.

* Respondent's exhibits which are underlined were received "In Camera".

Respondent has failed to prove by a preponderance of reliable, probative, and substantial evidence that garments manufactured by its seventeen "competitors", or any of them, did, in fact, compete with respondent's garments for the business of its favored customers, or for the retail customers' dollars. The burden of proving this competition was upon respondent. The price zones testimony of Professor Smith (Tr. 897, et seq.), standing alone, does not prove such competition. Representatives of most of the competitors who were subpoenaed denied competition with the Rabiner & Jontow lines. Not one of respondent's customers was called to testify as to competition between respondent and other manufacturers.

Evidence of competition between respondent and the firms which it subpoenaed may be summarized:

Glenhaven, Ltd.:

Bernard Gold, Vice president and general sales manager for the past seven years, appeared on behalf of Glenhaven, Ltd., 512 Seventh Avenue, New York, New York (Tr. 122, et seq.). This firm manufactures ladies' suits (no coats), which retail from $30.00 to $40.00. Occasionally, some of its items may retail for as much as $60.00. It sells to retail department stores and specialty shops (Tr. 130). There is little price competition between the Glenhaven and Rabiner & Jontow lines (Tr. 125-26). Respondent's garments retail at higher prices. Mr. Gold testified (Tr. 190):

> Q. Are you a competitor, is Glenhaven a competitor of Rabiner & Jontow?
>
> A. I don't believe so, no, sir.

Mr. Gold further testified that, although Glenhaven did make advertising allowances to some of its customers during 1960, 1961, and 1962 (Tr. 145), it did not pay any such allowances to Best & Co., Inc., Jordan Marsh Co., Jay's, Inc., and R. H. Stearns Co. It paid $100.00 to Woodward & Lothrop, Inc. in 1960; $35.00 to Lord & Taylor in 1960; and $238.00 to Lord & Taylor in 1962.

On occasion Eastman Kodak would give Glenhaven money to promote the sale of garments made from Kodel, and the Wool Bureau would allocate funds to promote the sale of garments made from wool. These monies were given to Glenhaven, which, in turn, allocated them to the retail firms (Tr. 148). Glenhaven suggested that the fabric advertising be carried in local newspapers (Tr. 151). Glenhaven used its own advertising funds to promote a particular line (Tr. 153), and a particular fabric.

During 1960, 1961, and 1962, Glenhaven placed institutional advertising in the fashion magazines, such as Mademoiselle, Glamour, Harper's Bazaar, and Vogue (Tr. 174). Such advertisements contained the names of the stores at which Glenhaven's advertised garments could be purchased. Glenhaven would notify these stores that their names would appear in the advertisements (Tr. 175). Mr. Gold, with his sales staff, selected the store whose name appeared in the institutional ads in the fashion magazines (Tr. 176). As many as five or six Glenhaven customers might be listed in a single ad (Tr. 180). The ad showed the garment, the name of the company, and the names of stores at which the garment was available (Tr. 181).

When Glenhaven spent its own money for advertising, it was on a "promotional basis for a particular fabric group to a particular city. In some of the cases of the fiber money we would offer it to the whole country" (Tr. 183).

Respondent has failed to prove that Glenhaven suits compete for the retail consumers' dollars with suits manufactured by Rabiner & Jontow. Respondent has failed to prove that, at the level at which Glenhaven suits are purchased by retail firms for resale, they compete in fact with "Bardley" (Rabiner & Jontow) garments.

Respondent has further failed to prove that the advertising allowances, which respondent paid to its favored customers, were granted to meet or match similar or identical advertising allowances paid by Glenhaven to such favored customers.

Barberini, Ltd.:

Kermit Bass, president, appeared on behalf of Barberini, Ltd., 512 Seventh Avenue, New York, New York (Tr. 192, et seq.). This firm manufactures and sells for resale ladies' coats and suits which retail from $80.00 to $150.00 (Tr. 193). Barberini, Ltd. was incorporated and first commenced to do business in May 1962. During the years involved in this proceeding, Barberini did not sell its products to any of respondent's favored customers in any of the relevant trading areas (Tr. 193, 196). Barberini granted no advertising allowances to respondent's favored customers (Tr. 198-99, 204).

Respondent failed to establish for the years here involved any competition whatsoever between respondent and Barberini, Ltd.

Buddy Bates Corp.:

Buddy Bates, president, appeared on behalf of Buddy Bates Corp., 250 West 39th Street, New York, New York

(Tr. 210, et seq.). This corporation manufactures ladies' coats and suits (Tr. 210), which ordinarily retail from $60.00 to $150.00, and during the years 1960 through 1962, retailed from $50.00 to $110 (Tr. 212, 215). During these years, Buddy Bates' suits retailed principally at $50.00, $55.00, $59.00, and $69.00 (Tr. 302-303). Mr. Bates testified that there is a basic style difference between Buddy Bates' garments and those manufactured by respondent (Tr. 304). He was not too familiar with the Rabiner & Jontow line, but he did not consider Rabiner & Jontow to be a competitor, nor has it been represented to him as a competitor by any of Buddy Bates' customers (Tr. 215-16, 304). No advertising allowances were paid by Buddy Bates to respondent's favored customers during the years involved (Tr. 219).

Respondent has failed to establish by reliable, probative, and substantial evidence in this record that the non-proportionalized cooperative advertising payments, which it made to its favored customers during the years in question, were made to meet or match similar payments by Buddy Bates, Inc.

Suitmaster Classics, Inc.:

Harry Snyder, president, appeared on behalf of Suitmaster Classics, Inc., 221 West 37th Street, New York, New York (Tr. 247, et seq.). This company manufactures ladies' suits retailing from $40.00 to $50.00 (Tr. 248, 254). During the years in question, it sold to Jordan Marsh Co., Woodward & Lothrop, Inc., Best & Co., Inc., and Lord & Taylor (Tr. 249). It paid $100.00 to Jordan Marsh Co. in 1961. Suitmaster's volume item in its line was a man-tailored, one-button suit which retailed at $39.98 (Tr. 251-

54). Suitmaster gave only one form of advertising allowance, i.e., one dollar per suit to all persons who purchased and advertised the one-button suit. Mr. Snyder testified (Tr. 254-55):

> Q. Were you in competition with Rabiner and Jontow during 1960 through 1962?
>
> A. . . . As far as Rabiner and Jontow, I believe they make higher-priced suits. . . .
>
> I would say that my competition would be, in my eyes, the people who make suits at my price level. . . .
>
> Q. Would you therefore consider yourself in competition with a firm whose retail price range is from seventy dollars to ninety dollars?
>
> A. Not in my eyes, no, sir.

Respondent failed to prove by reliable, probative, and substantial evidence in this record that its advertising payments to its favored customers were made to meet or match similar payments by Suitmaster Classics, Inc.

Lumay Coat Company, Inc.:

Sidney Malvin, secretary-treasurer, appeared on behalf of Lumay Coat Company, Inc., 230 West 38th Street, New York, New York (Tr. 311, et seq.). This company manufactures and sells ladies' coats and suits (Tr. 311), popular-priced fashion garments, retailing from $70.00 to $90.00 (Tr. 313). The company has made no attempt to promote the Lumay trade name (Tr. 313-14, 323-24). Of the respondent's six favored customers and during the years involved, Lumay paid only $202.00 to Lord & Taylor in

1962. Lumay's sales to Lord & Taylor for the three years involved were $29,000 in 1960; $42,000 in 1961; and $90,000 in 1962, a total of $161,000—with a $202.00 allowance on one job lot (Tr. 322). Mr. Malvin testified (Tr. 336-37):

> Q. Are you familiar with the product manufactured and sold by Rabiner & Jontow?
>
> A. Yes, sir.
>
> Q. Is yours a competitive item from the point of view of style?
>
> A. No.
>
> * * *
>
> Q. And they [respondent] make coats and suits?
>
> A. Yes.
>
> Q. Out of a typical fabric like you do, woolen fabrics?
>
> A. Woolen fabrics. That is where the similarity ends.
>
> * * *
>
> In my opinion, they [respondent] make a classic coat, a classic suit. Ours [Lumay] is a little more fashion.
>
> Q. Therefore, you don't consider that there is any competition at retail?
>
> A. I don't think so, no.
>
> * * *
>
> (Continuing) I would say our merchandise doesn't compete. I think the merchandise they make, the type of merchandise we make, complement one another.

Respondent has failed to prove by reliable, probative, and substantial evidence that its advertising payments to its favored customers during the years involved were made to meet or match similar payments by Lumay Coat Company, Inc. to the same favored customers.

Modelia, Inc.:

Gunther Oppenheim, president, appeared on behalf of Modelia, Inc., 205 West 39th Street, New York, New York (Tr. 346, et seq.). This company manufactures ladies' coats (Tr. 346), which retail the spring line from $60.00 to $165.00, and the winter line from $70.00 to $300.00 (Tr. 348-49). Some of the firm's winter coats are fur lined (Tr. 349), and Mr. Oppenheim characterized their styling as high-fashion, avant garde—a "gimmick operation" (Tr. 357). The firm specializes in novelty products. Mr. Oppenheim's opinion is that Modelia is a "trend-setter" of the industry with respect to introducing new fabrics (Tr. 357-58). He testified:

> In a sense, I don't believe there is one single company in the entire trade which I consider competition (Tr. 366-67).
>
> Q. Is it your position that . . . a coat which sells for the same price as the one which you sold to the store would not be in competition with you if it was on the racks?
>
> A. No, our styling conception is completely different. This is a well known fact (Tr. 367).

* * *

Q. You had no competition?

A. I do not feel that I had any competition (Tr. 368).

* * *

Q. Mr. Oppenheim, was Rabiner & Jontow your competitor during 1960, 1961 and 1962?

A. I do not consider them a competitor of ours (Tr. 390).

The record shows that Modelia granted a total of $6700 advertising allowances to Lord & Taylor for the years 1960, 1961 and 1962 (Tr. 355), and $350.00 to Best & Co., Inc. for the three years. After Mr. Oppenheim testified that the Modelia line does not compete with the Rabiner & Jontow line of garments, it was incumbent upon respondent to place in this record some reliable, probative, and substantial evidence to prove that Mr. Oppenheim was in error. Respondent has failed to do this. The record does not support a finding that the non-proportionalized advertising allowances paid by respondent to its favored customers, and particularly to Best & Co., Inc. and Lord & Taylor, were given to meet or match a similar or identical advertising payment by Modelia, Inc.

Towncliffe, Inc.:

Howard B. Herbert appeared on behalf of Towncliffe, Inc., 512 Seventh Avenue, New York, New York (Tr. 391, et seq.). This company manufactures ladies' coats and suits (Tr. 391). Their suits retail at $70.00 to $125.00, and the coats retail from $90.00 to $125.00 (Tr. 392). The firm markets under the names, "Towncliffe" and "Towntree" (Tr. 392). They manufacture conservative, well-made,

tailor type garments (Tr. 393). Towncliffe's suits are made of wool, cotton, and silk (Tr. 399), while respondent utilizes primarily wool (Tr. 1119, 1141-42). Towncliffe made the following advertising payments to two of respondent's favored customers during the periods involved:

LORD & TAYLOR

1960	$1945.20
1961	$2952.77
1962	$ 831.60

BEST & CO., INC.

1960	$1200.00	
1961	$2847.00	
1962	$1950.00	(Tr. 395)

However, the evidence does not support a finding that respondent's advertising payments to Lord & Taylor and Best & Co., Inc. during the years in question were made to meet or match advertising payments made by Towncliffe. Most of the time Towncliffe deferred to the decision of its customer who was going to run the ad (Tr. 399). Towncliffe had no advertising budget as such (Tr. 400). During 1960, 1961, and 1962, if Towncliffe engaged in advertising, it was either cooperative or editorializing advertising (Tr. 401).

There is no evidence to show which of Towncliffe's products were promoted by Lord & Taylor and Best & Co., Inc.

The Towncliffe representative testified:

> Q. The evidence in this case shows that Rabiner & Jontow's retail price range is from $70 to $90. Your [Towncliffe's] price range runs higher. Do you

consider yourself in competition as to your entire price range? (Tr. 425-26.)

A. . . . we wouldn't be in competition from $90 to $125. I would say we are in competition from $70 to $90 (Tr. 426).

Respondent has failed to prove that its non-proportionalized advertising allowances to its favored customers were granted to meet or match similar Towncliffe advertising allowances for products which compete at the retail level with respondent's products for the consumers' dollars, and competed for sales to the favored customers.

Zelinka-Matlick, Inc.:

David Zelinka appeared on behalf of Zelinka-Matlick, Inc., 512 Seventh Avenue, New York, New York (Tr. 433, et seq.). This firm manufacturers ladies' coats and suits (Tr. 433). Its spring coats retail from $80.00 to $110.00 and the spring suits from $80.00 to $130.00 (Tr. 433-34). Its winter coats retail from $90.00 to $200.00, and winter suits from $90.00 to $200.00 (Tr. 434). The firm manufactures high-style fashion garments (Tr. 435, 480). Mr. Zelinka testified that his firm does not compete with respondent. He testified that it makes "a higher priced line than Rabiner & Jontow" (Tr. 481). The two lines overlap price wise at the very lowest level. Even there, Mr. Zelinka denied that Rabiner & Jontow garments competed with Zelinka-Matlick garments. Mr. Zelinka opined that the same price range is only one of several elements which cause competition between different manufacturers of ladies' coats and suits (Tr. 480-82).

After Mr. Zelinka's denial that there was competition between the Rabiner & Jontow line and the Zelinka-Matlick line, the burden was then upon respondent to prove by a preponderance of reliable, probative, and substantial evidence that such competition does and did exist. Such proof has not been made. Respondent's act of naming Zelinka-Matlick, Inc. as a competitor does not constitute proof of the fact. Respondent has not proven that its advertising allowances to its favored customers were granted to meet or match similar allowances by Zelinka-Matlick, Inc. to the same favored customers.

Handmacher-Vogel, Incorporated:

Edward Halpert, vice president and treasurer, appeared on behalf of Handmacher-Vogel, Incorporated, 533 Seventh Avenue, New York, New York (Tr. 493, et seq.). It manufactures and sells in interstate commerce women's suits. Its "Handmacher" suits retail from $60.00 to $100.00. Its "Weathervane" unlined suits retail from $30.00 to $50.00 (Tr. 494). Its garments cover a "broad spectrum of suit styling" (Tr. 496) with emphasis on high style.

The only one of respondent's favored customers to whom Handmacher-Vogel granted advertising allowances during the years here involved was Lord & Taylor. The allowances were: for 1960, $2191.49; for 1961, $745.58; and for 1962, $632.98 (RX 11 *in camera*).

Of the nine payments to Lord & Taylor by Handmacher-Vogel, seven were used to advertise the spring and summer line which retails from $30.00 to $50.00. (RX 11B, RX 11G, RX 11H, RX 11I, RX 11J and RX 11L, all *in camera.*) This line does not compete price wise with

the Rabiner & Jontow line which retails, as previously found, from $70.00 to $90.00.

Handmacher-Vogel's advertising payments were not made according to a plan, but were negotiated separately at the time they were made (Tr. 516). In some instances, Handmacher-Vogel paid the full cost of the ad. In other instances, it paid only a part of such cost (Tr. 517). Handmacher-Vogel's advertising payments were not based upon the volume of business done with a customer, nor the importance of the retailer in terms of prestige. It was negotiated at a particular instance in time (Tr. 519). The retailer took the initiative in attempting to secure Handmacher-Vogel advertising allowances (Tr. 520). Handmacher-Vogel refused some requests, and granted others (Tr. 520-21).

Handmacher-Vogel advertises generally in Vogue, Harper's, and Mademoiselle. These ads sometimes featured the names of the Handmacher-Vogel accounts in a particular city (Tr. 555).

Respondents has failed to prove that its advertising payments to its favored customers were made to meet or match similar payments by Handmacher-Vogel, Incorporated to the same customers.

Briarbrook, Inc.:

Bertram Barber, president, appeared on behalf of Briarbrook, Inc., 512 Seventh Avenue, New York, New York (Tr. 568, et seq.). This company is a manufacturer of ladies' suits (Tr. 570). Briarbrook's spring suits retail from $60.00 to $110.00; summer suits from $40.00 to $55.00; and the fall suits from $70.00 to $125.00 (Tr.

570-71). The suits can be described as "fashion" or style garments (Tr. 571). Mr. Barber's testimony does not prove that Briarbrook is in fact in competition with Rabiner & Jontow (Tr. 580-599). Evidence was elicited concerning Briarbrook advertising allowances to Jordan Marsh Co. and Lord & Taylor (two of respondent's favored customers [RX 12; Tr. 600-601]). Mr. Barber was unable to testify as a certainty that the payments were in fact advertising allowances (Tr. 599). His testimony does not prove that respondent's advertising payments to its favored customers were made to meet or match similar or identical payments by Briarbrook to the same favored customers.

Respondent failed to establish the existence of competition between respondent and Briarbrook, Inc. for sales to respondent's favored customers. Respondent, likewise, did not introduce any specific evidence that its garments and the Briarbrook garments did and do, in fact, compete for the retail purchasers' dollars.

David Crystal, Incorporated:

Harold Cohen, comptroller, appeared on behalf of David Crystal, Incorporated, 498 Seventh Avenue, New York, New York (Tr. 606, et seq.). He has been its comptroller since July 1, 1963 (Tr. 607). David Crystal is primarily a manufacturer of a classic line of ladies' suits that sell under the trade name of "David Crystal" (Tr. 613).

> HEARING EXAMINER GROSS: Would you characterize the general styling of David Crystal, Inc. as pretty similar to the line of Rabiner & Jontow?
> THE WITNESS: Well, I don't propose to be a fashion man. But from my information with people in the

industry and people in my company, it appears that Rabiner and Jontow and David Crystal's styling is very similar. (Tr. 612.)

Mr. Cohen had been comptroller of David Crystal, Incorporated only since July 1, 1963, and was not qualified to testify specifically to the competition, if any, between respondent and David Crystal for the coat and suit business of the respondent's favored customers. Mr. Cohen produced papers which are in evidence as RX 13A-13J, RX 14A-14Z10, RX 15A-15Z10, and RX 16A-16Z2, all *in camera*. The exhibits, plus Mr. Cohen's testimony, support a finding that David Crystal made cooperative advertising payments to some of respondent's favored customers, as follows:

	1960	1961	1962
Lord & Taylor		$1317.00 (RX 15A-15Z10, *in camera*)	$750.00 (RX 13F *in camera*)
Best & Co.	$8250.38 (RX 14A-14Z10, *in camera*)	$6184.08 (RX 16A-15Z10, *in camera*)	$7401.50 (RX 16A-16Z2, *in camera*)

Some of the David Crystal exhibits (RX 13A through RX 16Z2, *in camera*) indicate, and it is found, that many of the advertising allowances, which made up the five general totals given above, were paid to promote David Crystal's garments which were not competitive to respondent's garments. At the outset of Mr. Cohen's testimony, he testified that Mr. Vincent Draddy, president of David Crystal, would be best qualified to testify concerning its competition, if any, with respondent within the framework of respondent's "meeting competition defense". Mr. Draddy was not thereafter subpoenaed.

The record does not contain substantial and probative evidence that respondent's advertising payments to its favored customers were made in response to a specific, competitive situation to meet or match similar or identical advertising payments by David Crystal, Incorporated to the same favored customers. The evidence also fails to establish that the garments manufactured by respondent competed with the garments manufactured by David Crystal, Incorporated for sales to the favored customers, or for sales to retail customers.

Davidow Suits:

Archibald Davidow, one of its principal stockholders and officers, appeared on behalf of Davidow Suits, 205 West 39th Street, New York, New York (Tr. 650, et seq.). This company manufacturers and sells women's suits for resale at retail under the label "Davidow" for a price of $125.00 and up (Tr. 652-53). Prior to 1960, Davidow Suits developed a cooperative advertising plan which was offered to all Davidow customers throughout the country (Tr. 657). Davidow has been very selective in its marketing and sells to very few marketing outlets in each marketing area (Tr. 657). Davidow may also give only one of these very few outlets the exclusive right to buy and resell a specified style in a particular area (Tr. 658). Davidow has many styles in its line, and it has marketed generally by giving exclusive styles where advertising "is put on it" (Tr. 659). Although many Davidow styles are carried by more than one retail outlet in a marketing area, if a style is advertised, it will usally be available only at the retail outlet which advertises it (Tr. 659).

The Davidow cooperative advertising plan was made available to all Davidow customers throughout the country (Tr. 659). Davidow made no sales to Best & Co., Inc. in New York City in 1960, 1961 and 1962; nor to Woodward & Lothrop, Inc. in Washington, D. C., in 1960 and 1961; and it did not offer to sell its products to these establishments, and it did not pay nor offer to pay any advertising allowances to them (Tr. 659). In 1960 and 1961, Davidow did not pay any advertising allowances to Jay's Inc., nor to Jordan Marsh Co. in Boston (Tr. 660). Jay's and Jordan Marsh were offered Davidow's advertising plan, but refused it (Tr. 660). Pursuant to the plan, payments were made in 1960 and 1961 to R. H. Stearns Co. in Boston—$1559.10 in 1960, and $1339.60 in 1961 (RX 17 *in camera*); and to Lord & Taylor in New York City, $5606.68 in 1960; $8358 in 1961; and $7828.86 in 1962 (RX 19 *in camera*). Davidow's letter offering its cooperative advertising plan to its customers is in evidence as RX 18 *in camera.*

In 1960, Davidow Suits paid advertising allowances to the extent of 50% of the cost of the advertising actually expended by Lord & Taylor. Payments were made based upon tear sheets of the advertisement, plus a stated sum for production costs (Tr. 663). Lord & Taylor's advertising department did the art work for the advertisement. Later Davidow changed its arrangement with Lord & Taylor from that of paying 50% of the cost of the advertisement to a basis of paying 5% of anticipated sales during the course of a year. Mr. Davidow testified that his firm has received more benefit from the 5% of sales arrangement than from the former 50% of cost plan (Tr. 664-65). Davidow's 5% arrangement with Lord & Taylor was not duplicated with any other Davidow customer in Boston,

New York City, or Washington, D. C. Davidow paid for all its advertising in fashion magazines (Tr. 669).

Davidow's cooperative advertising plan, exemplified by RX 18 *in camera,* was offered to all Davidow customers (Tr. 673).

There is not any reliable, probative, and substantial evidence that respondent's non-proportionalized advertising payments to its favored customers in New York City, Boston, and Washington, D. C., were made in good faith to meet or match identical or similar payments by Davidow Suits to the same customers.

Linker & Company, Inc.:

Maurice Linker, president, appeared on behalf of Linker & Company, Inc., 512 Seventh Avenue, New York, New York (Tr. 706, et seq.). He has been in the ladies' garment business for twenty-five years (Tr. 707). From 1960 to 1963, its garments retailed from $49.00 to $69.00 (Tr. 708). During these years, the company did not use its funds to advertise its products (Tr. 710). Linker never received any money from any textile, fur or fiber company to be used in cooperative advertising (Tr. 713). During the three year period, Linker sold about $15,000 to Lord & Taylor, and $500,000 to Peck & Peck. One specialized $1,000 advertising allowance was paid to Peck & Peck over the three year period. Linker made garments to Peck & Peck specifications. It did not seek to build up its own label. The garments, which Linker made for Peck & Peck, were classic—basic (Tr. 718). The styles of the merchandise manufactured by Linker for Peck & Peck were usually "confined" to Peck & Peck only, and not sold to other Linker customers (Tr. 721).

Linker sold R. H. Stearns Co. in Boston, but gave them no advertising allowances (Tr. 721). Linker gave no

advertising allowances to the stores it sold in Washington, D. C. (Tr. 722).

Respondent's non-proportionalized advertising payments to its favored customers were not made to meet or match similar or identical advertising payments by Linker & Company, Inc. to the same favored customers.

Cuddle Coat, Inc.:

Justin Lipman, vice president, appeared on behalf of Cuddle Coat, Inc., 500 Seventh Avenue, New York, New York (Tr. 725, et seq.). A Cuddle Coat advertisement in The New York Times' magazine section of February 28, 1962, in which the name of the manufacturer and retailer (Lord & Taylor) appeared, is in evidence as RX 37. Cuddle Coat, Inc., a division of Petite Miss Co., manufactures and sells highly styled, only untrimmed coats which retail from $50.00 to $75.00. It caters to smaller girls' and misses' sizes (6 to 14 or 5 to 13)—the younger market (Tr. 731). During the years from 1960 to 1962, the firm sold Woodward & Lothrop, Inc. in Washington, D. C.; R. H. Stearns Co. in Boston; and Lord & Taylor in New York City (Tr. 729). Cuddle Coat mentioned the names of some of its retail outlets in its ads (RX 37; Tr. 737). During the years 1960 to 1962, it did not make cooperative advertising payments to its retail store customers (Tr. 735). Mention of the retail establishments in its ads was for the purpose of giving Cuddle Coat prestige—not the retail outlet (RX 37; Tr. 736).

In addition to Lord & Talyor, Cuddle Coat sold in New York City to Franklin Simon, Macy's, Gimble Bros., and Bonwit Teller. It did not pay any advertising allowances

to anyone (Tr. 743, 749). It was not Cuddle Coat's policy during the pertinent years to give money toward advertising (Tr. 747).

The Cuddle Coat representative testified that The New York Times' magazine section requires 60 days lead time for the placement of fashion advertisements, and fashion magazines require 90 days lead time.

In the fashion magazines, Vogue, Mademoiselle, and Harper's, Cuddle Coat usually did not mention the retail establishments selling its merchandise.

A one page color advertisement in The New York Times' magazine section cost Cuddle Coat about $5,000. Cuddle Coat usually ran such advertisements in The New York Times' magazine section about twice a year. (Tr. 737). Unlike respondent's procedures, Cuddle Coat advertisements were not worked out in consultation with its retail store customers; nor were its retail store customers asked to cooperate (Tr. 738-39). Cuddle Coat's advertising policy was totally different in purpose and execution from respondent's advertising policy. A retail store was mentioned in the Cuddle Coat ad strictly as a matter of "convenience", so that the Cuddle Coat office "wouldn't be badgered by telephone calls and letters in New York City" inquiring where the Cuddle Coat in the advertisement might be purchased (Tr. 740). At the time Cuddle Coat mentioned Lord & Taylor in its advertisements in The New York Times, it was also selling in New York City to Franklin Simon, Macy's, Gimbel Bros., and Bonwit Teller, as above found.

Since Cuddle Coat didn't give advertising allowances to any of its customers (Tr. 743), respondent's advertising allowances could not have been made to meet or match

those of Cuddle Coat. Respondent's evidence fails to prove that its non-proportionalized advertising payments to its favored customers were made in good faith to meet or match similar advertising payments made by Cuddle Coat, Inc. to the same favored customers.

Devonbrook, Inc.:

Morton Cytron, comptroller and assistant secretary, appeared on behalf of Devonbrook, Inc., 1400 Broadway, and 500-512 Seventh Avenue, New York, New York (Tr. 769, et seq.). This company has the following subsidiaries: Devonshire Junior, Inc.; Brandshire, Inc.; Devshire, Ltd.; Heart Throb, Inc.; Devonaire, Ltd.; Devonknit, Inc.; and Miss Devon, Inc. Devonbrook stock is publicly held, and traded over the counter (Tr. 770). The principals in the company are Sigfried Alper, Owen Alper, and William Alper—"a father, brother and son" combination. The company manufactures and sells junior dresses and suits, which retail in the fall season from $23.75 to $42.75 (Tr. 770). In the spring season, the line retails at $17.75 to $39.75 (Tr. 771).

Devonbrook and its subsidiaries did not use traveling salesmen. They sold from their showrooms at the addresses stated above.

In 1960, 1961, and 1962, the companies did not participate in national advertising, as such (Tr. 777).

If one of the Devonbrook customers would feature a particular Devonbrook garment in an advertisement, Devonbrook would give the retail outlet an allowance equal to a dollar per garment, provided the retailer mentioned the Devonbrook name, and submitted tear sheets as proof that the advertisement had been run. The average cost to Devon-

brook of such advertisements would be about $200.00 to $300.00. Most of such advertisements were run in The New York Times (Tr. 778-79). The Devonbrook customer usually submitted a debit memo with a tear sheet of the ad attached (Tr. 779). If a Devonbrook customer spent $2,000 on an advertisement and sold only ten Devonbrook garments, such customer would have been paid only $10.00. So the burden was on Devonbrook's retail outlets to be very astute in selecting the Devonbrook merchandise to be advertised (Tr. 780). The Devonbrook look . . . is accepted in the junior market as young, fashionable and popularly priced" (Tr. 781).

During the years involved in this proceeding, Devonbrook did not engage in national advertising of any kind (Tr. 782). Devonbrook has learned that, when the customers advertise its products in the local newspapers, they get the best results (Tr. 783).

Devonbrook did no business with Lord & Taylor during the years involved. Devonbrook's only advertising payments to any of respondent's favored customers for the relevant years were to Best & Co., Inc., as follows: 1960—$7,750; 1961—$11,100; and 1962—$8,650 (RX 21 *in camera*).

Respondent's non-proportionalized advertising payments to its favored customers were not made to meet or match specific or similar payments by Devonbrook to the same customers. The evidence will not support a finding that respondent's garments and Devonbrook's garments competed with each other for the patronage of retail establishments, or for retail customers' dollars.

Country Tweeds, Inc.:

Harry Glassman, controller, appeared on behalf of Country Tweeds, Inc., 250 West 39th Street, New York, New York (Tr. 1158, et seq.). This company manufactures ladies' coats which retail from $75.00 to $225.00, roughly (Tr. 1159). During the relevant years, Country Tweeds would cooperate with stores generally for newspaper advertising where Country Tweeds would pay 50% of their ads usually, and sometimes more, up to the amount of a commitment which it would make to such customers at the beginning of the season (Tr. 1160). After a particular retail establishment had spent the amount which Country Tweeds had allocated to it, all further advertising was at the retail establishment's own expense (Tr. 160).

During the relevant years, Country Tweeds advertised in Life, Vogue, Harper's Bazaar, and "maybe one or two others" (Tr. 1161). Some of Country Tweed's retail stores may have been mentioned, but Country Tweeds "were then told" that they could not mention the names of some of their customers without mentioning all, so they stopped mentioning any names (Tr. 1161-62).

During 1960, 1961, and 1962, Country Tweeds never received any allowance from any textile fiber house or textile company to be used in advertising their products (Tr. 1166).

Country Tweeds paid Lord & Taylor a $4,299.99 advertising allowance in 1961, and $4,014.72 in 1962 (Tr. 1167). They paid Woodward & Lothrop, Inc., $1,190.23 in 1961 (Tr. 1168), and $1,641.98 in 1962 (Tr. 1169); and paid $6,700 to Jordan Marsh Co. for cooperative advertising in 1961, and $2,979 in 1962 (Tr. 1169).

During the years in question, Country Tweeds provided their customers mailing pieces, brochures, with the company name upon them without charge. Country Tweeds furnished such mailing pieces to those customers who requested them. All their customers did not request them (Tr. 1169). Their free mailing pieces were made known to their customers "by word of mouth" (Tr. 1170). Their 1961 advertising payment to Lord & Taylor of $4,299.99 included a $1,350 figure for advertising in a Lord & Taylor catalogue (Tr. 1170).

Mr. Glassman testified (Tr. 1173):

> Q. Do you know the company Rabiner & Jontow?
> A. I frankly never heard of them until I received this subpoena.

Country Tweeds make a "prestige" garment which they sell to "prestige" retail establishments (Tr. 1174). They have a few customers in each retail market (Tr. 1175). In 1960 and 1961, Country Tweeds sold to Woodward & Lothrop, Inc., exclusively, in Washington, D. C., and to Jordan Marsh Co., exclusively, in Boston (Tr. 1175-76).

The evidence fails to prove that during the years involved Rabiner & Jontow, Inc. competed with Country Tweeds, Inc. for sales to respondent's six favored customers, or that Country Tweeds' garments competed with respondent's garments for the dollars of the ultimate consumer—the retail purchaser. Although Country Tweeds, Inc. paid advertising allowances to some of respondent's favored customers during the years involved, the hearing examiner cannot find from the evidence that respondent's non-proportionalized advertising allowances were paid to meet or match a similar payment by Country Tweeds, Inc.

"in 'individual competitive situations, rather than * * * [in] a general system of competition.'" (See *Exquisite Form Brassiere, Inc., et al., supra,* p. 10).

Jack Feit, Inc.:

Due to the illness of its president, Lillian Hertzberg, its bookkeeper, appeard on behalf of Jack Feit, Inc., 530 Seventh Avenue, New York, New York (Tr. 1191, et seq.). This company manufactures coats and suits, mostly suits, which retail from $70.00 to $125.00 (Tr. 1202). She testified that the only advertising allowance paid by Jack Feit to any of respondent's favored customers during the years 1961 and 1962 was $3,783.95 paid to Lord & Taylor (Tr. 1199, 1203). Jack Feit sold its garments to some of respondent's other favored customers, but did not pay any advertising allowances to these others. It did not make its cooperative advertising payments pursuant to any published plan (Tr. 1204).

The evidence in this record fails to establish that respondent's non-proportionalized advertising allowances paid to its favored customers were paid to meet or match a specific, similar payment by Jack Feit, Inc. to the same favored customers.

Respondent failed to prove that Jack Feit, Inc. competes with it in the sale of coats and suits to respondent's favored customers. Respondent failed, likewise, to prove that Jack Feit's garments compete with Rabiner & Jontow's garments for the dollars of the ultimate consumer—the retailer purchaser.

CONCLUSIONS OF LAW

Respondent, Rabiner & Jontow, Inc., 512 Seventh Avenue, New York, New York, a New York corporation,

which has been doing business continuously since 1942, manufactures and sells in interstate commerce ladies' coats and suits under the trade names of "Bardley", "Bardley, Jr.", and under private labels. Respondent's products are sold for resale at retail.

Respondent has been, at all relevant times, and now is, engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

Respondent has been, and now is, in competition with other persons, firms and corporations who manufacture and sell for resale at retail similar lines of ladies' coats and suits.

The Federal Trade Commission has jurisdiction over Rabiner & Jontow, Inc. and the subject matter of this proceeding. This proceeding is in the public interest.

In the course and conduct of its business in commerce during the years 1960, 1961, and 1962, in the Cities of New York, New York, Boston, Massachusetts, and Washington, D. C., respondent paid non-proportionalized advertising allowances to its favored customers, as hereinabove found, without making such payments available to all of its other, nonfavored, customers who competed with its favored customers in the sale at retail of respondent's products of like grade and quality.

Respondent represents that segment of ladies' coat and suit manufacturers, whose garments usually sell at retail basically in the price range between $70.00 and $90.00.

Respondent's non-proportionalized advertising payments did, and do, constitute a violation of Section 2(d) of the Clayton Act, as amended, and should be enjoined.

Respondent has failed to prove by reliable, probative, and substantial evidence that its garments compete with

the garments of the "competitors", whom it subpoenaed, for sales to the retail establishments who purchase respondent's garments, or for sales to the ultimate consumer—the retail buyer.

Respondent has failed to prove by reliable, probative, and substantial evidence that its advertising payments were made in good faith to meet or match the same or similar advertising payments made by any one or more of its competitors to the same customers to whom respondent made its advertising payments.

Respondent's evidence fails to bring its non-proportionalized advertising payments within the criteria established by the Federal Trade Commission in its opinion in *Flotill Products, Inc.,* Docket No. 7226 (*supra,* pp. 5-6); *Ace Books Inc.; et al.,* Docket No. 8557 (*supra,* pp. 8-9); and *Exquisite Form Brassiere, Inc., et al.,* v. *Federal Trade Commission* (C. A. D. C. No. 18524) —— F. 2d —— (*supra,* pp. 9-19).

Counsel supporting the complaint have proven the material allegations of the complaint by reliable, probative, and substantial evidence, and respondent has failed to prove that its unlawful, non-proportionalized advertising payments were made to meet a specific payment of a competitor in an individual competitive situation, rather than in a general system of competition.

ORDER

NOW, THEREFORE, IT IS ORDERED that respondent Rabiner & Jontow, Inc., a corporation, its officers, directors, agents, representatives, and employees, directly or through any corporate or other device in the course of its business

in commerce, as "commerce" is defined in the Clayton Act, as amended; do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

LEON R. GROSS.
Leon R. Gross,
Hearing Examiner.

July 16, 1965

Opinion of the Commission

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of
RABINER & JONTOW, INC.,
a corporation.
Docket No. 8629

By Reilly, Commissioner:

This matter is before the Commission on the appeal of respondent, Rabiner & Jontow, Inc., from an initial decision of the hearing examiner holding that respondent had violated subsection (d) of section 2 of the Clayton Act, as amended, and ordering respondent to cease and desist from the practices found to be unlawful.

The complaint herein alleged that respondent, a manufacturer of ladies' suits and coats, had granted promotional allowances to certain of its customers without making such allowances available on proportionally equal terms to other customers competing in the sale of respondent's products. The respondent admitted many of the material allegations of the complaint in its answer but claimed as an affirmative

defense that in every instance in which it granted promotional allowances it did so in good faith to meet competition. The hearing examiner found, primarily on the basis of respondent's admissions and stipulations of fact, that during the years 1960 through 1962 respondent had granted advertising allowances to certain favored customers located in the cities of Boston, Massachusetts, New York, New York, and Washington, D. C.; that other customers competing in the sale, at retail, of respondent's products did not receive any advertising or promotional allowances during this period; that allowances granted by respondent were individually negotiated on an *ad hoc* basis for each advertisement; that respondent had no plan whereby competing customers might qualify for an advertising allowance; and that respondent's payments were not made available on proportionally equal terms even among favored customers.

To establish the claim that its allowances were justified under the 2(b) proviso as good faith efforts to meet allowances furnished by competitors, respondent called as witnesses the president of the corporation, Abbe Rabiner, representatives of 17 coat and suit manufacturers, and an associate professor of retail mechandising at New York University who testified as an expert witness. The examiner rejected this defense, holding that respondent had failed to prove through the testimony of these witnesses that its non-proportionalized advertising payments were made in order to meet comparable payments in specific, individual, competitive situations. The examiner found in this connection that the testimony of Rabiner and the expert witness related only to general competitive conditions in that segment of the garment industry of which respondent is part and not to the issue of whether respondent's discriminatory payments were made defensively in good faith

response to promotional payments offered to its customers by competing garment manufacturers. The examiner also found that respondent had failed to prove through the testimony of the 17 manufacturers' representatives that it was in fact competing with those particular manufacturers in the distribution of its products. He also found that none of these manufacturers, individually, paid to respondent's favored customers the large cooperative advertising allowances that respondent paid. He concluded from his review of the record that there was no evidence that respondent's allowances were granted to meet or match a similar payment by a specifically named competitor who, at the time, was selling competing merchandise to respondent's favored customers.

In its appeal from the initial decision respondent does not contest the examiner's finding of a *prima facie* violation of 2(d). It contends, however, that the complaint should be dismissed on two grounds; the first being lack of public interest in the proceeding and the second, that its allowances were made in good faith to meet competition.

Respondent's "public interest" argument is based primarily on the undisputed fact that violations of 2(d) have been widespread in the wearing apparel industry. This argument, as we understand it, is not that the Commission should have made no attempt to correct these illegal practices but that the Commission has gone about it in the wrong way. The respondent is, of course, well aware of the Commission's efforts to secure industrywide compliance with section 2(d). See *In the Matter of Abby-Kent Co., Inc.,* Docket No. C-328, et al. An investigation undertaken by the Commission in 1961 disclosed that a large number of garment manufacturers were discriminating among competing customers in the granting of advertising

and promotional allowances. The Commission thus having reason to believe that violations of section 2(d) existed throughout the industry made the determination, after considering and rejecting other proposed remedial approaches, that a general correction of these practices could best be accomplished by affording members of the industry an opportunity to sign consent agreements containing orders to cease and desist from granting discriminatory allowances. Subsequent thereto, the Commission during a period of approximately two years accepted agreements and orders from 298 apparel producers including those significant sellers who were granting the largest amounts of allowances to the greatest number of buyers. On August 9, 1965, all outstanding orders were made effective, the Commission having determined at that time that this particular phase of the wearing apparel inquiry was for the most part terminated and that "The few unresolved matters do not involve suppliers who constitute a force capable of competitively disadvantaging those industry members who will be under order." *Abby-Kent, supra.* The Commission further pointed out that its enforcement program in this industry would, when necessary, be supplemented by formal proceedings against selected buyers who knowingly induce or receive discriminatory allowances.

Although cognizant of the foregoing facts, respondent now asks us to reconsider our enforcement policy in the light of the decision in the *Max Factor* and *Shulton cases.*[1] In these two cases complaints charging two cosmetic manufacturers with violating section 2(d) were dismissed, the Commission having found that the respondents were only two among a large number of suppliers participating in

[1]Docket Nos. 7717 and 7721, July 22, 1964.

special promotional events sponsored by a single buyer. We held in our opinion that the entry of cease and desist orders against these particular respondents would not be an equitable and fully effective method of eliminating the discriminatory practices and that in the circumstances shown to exist the "enforcement policy best calculated to achieve the ends contemplated by Congress" was one based on Section 5 of the Federal Trade Commission Act and directed at the recipient of the discriminatory allowances.

Respondent contends that on the basis of our holding in *Max Factor* and *Shulton* we should dismiss the complaint against it and bring suit against its favored customers under Section 5 for inducing discriminatory allowances. This argument is rejected. Our disposition of the two cases relied upon by respondent cannot be interpreted as a policy decision to proceed only against buyers who induce 2(d) violations rather than against the seller who has violated 2(d). The fact that in a given industry or market buyers may be largely responsible for inducing discriminatory practices is not sufficient reason for suing them to the exclusion of the supplier. It may be that more often than not large buyers are responsible for a seller's discriminations. And Congress was fully aware of this fact when it passed the Robinson-Patman Act. The Act nevertheless is directed against the seller as well as the buyer. In any event, our enforcement policy must be guided by the circumstances as we see them which will also take into account the respective effectiveness of the various remedies available to us. For example, proceeding against buyers under Section 5 would certainly be indicated where such a suit against one or two buyers would have the same remedial effect as a multitude of actions against sellers under 2(d). *Grand Union* v. *F. T. C.*, 300 F. 2d 92 (2nd Cir. 1962), *American News*

Co. v. *F. T. C.*, 300 F. 2d 104 (2nd Cir. 1962), *Giant Food Inc.* v. *F. T. C.*, 307 F. 2d 184 (D. C. Cir. 1962), *R. H. Macy's & Co., Inc.* v. *F. T. C.*, 326 F. 2d 445 (2nd Cir. 1964).

Furthermore, we fail to detect any similarity in the circumstances under which this case was brought and those of the *Max Factor* and *Shulton* cases. Our investigation of the wearing apparel industry had disclosed the likelihood that in many instances department and specialty store chains had been responsible for the discriminatory allowances. In other instances it seemed likely that it was the suppliers themselves who had initiated the practice. Being fully aware of the existing situation, the Commission made the determination long before it brought suit against respondent that the elimination of the discriminatory practices could best be achieved by proceeding against the suppliers. It has executed this policy by securing consent agreements from all but a few firms, which include the respondent, where the facts disclosed by the investigation gave it reason to believe that 2(d) was being violated. Thus the factual situation here is diametrically opposite that shown to exist in the cosmetic cases. Here a decision not to dispose of the case on the merits would not only be unfair to suppliers already under order but would tend to weaken the Commission's entire enforcement program in this industry.

Respondent also asserts that the proceeding is not in the public interest because small manufacturers cannot afford to make promotional payments on the same basis or in the same amount as their larger competitors. It states in this connection that some large apparel manufacturers have set up programs providing for proportionalized allowances of up to 50 percent and higher of the buyers' cost of advertising and further claims that it would be impossible

for it to grant such large payments on proportionally equal terms to all of its competing customers. As found by the hearing examiner the evidence on this point is inconclusive. But even if respondent were able to prove its inability to duplicate the lawful promotional programs of the very large apparel manufacturers there is nothing in the record to indicate that respondent could not establish its own nondiscriminatory promotional plan and, when necessary to meet competition, deviate from that plan by paying to certain customers the same amount as the larger competitor whose allowance it is meeting.

In its appeal from the examiner's holding that its discriminatory promotional payments were not granted in good faith to meet competitors' allowances, respondent in effect concedes that it has failed to make out a meeting competition defense under established legal criteria. It contends in this connection that there is a difference between price discrimination and the granting of discriminatory allowances and that the Commission, therefore, should utilize different standards for determining the sufficiency of the meeting competition defense in 2(d) cases as distinguished from those involving *prima facie* violations of 2(a).

Respondent has failed to suggest any standards or tests for determining whether, and under what circumstances, an advertising allowance has been properly granted to meet in good faith a competitor's allowance although it obviously believes that the practice of making promotional payments on a discriminatory basis for 20 odd years without attempting to establish a nondiscriminatory program comes within the realm of permissible behavior. It does suggest however the elimination of one element of proof required in a meeting competition defense to a 2(a) violation and that is proof that the discriminatory payment was made in response to a

payment offered by another seller in an actual competitive situation. This element of proof, however, goes to the "actual core" of the meeting competition defense which "consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231, 242.

Respondent's argument, as we understand it, is that the granting of promotional allowances is a legitimate method of competing and that in an industry in which the practice of granting allowances is widespread a seller should be permitted to grant disproportionate allowances to meet competition generally without showing that any particular payment was made to meet a specific competitive offer. There is, of course, nothing inherently unlawful about promotional allowances. Cooperative advertising has traditionally been regarded as a legitimate method of sales promotion. Congress has found however that a sales promotional allowance "becomes unjust when . . . the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." H. R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936). Consequently, the basic purpose of 2(d) was to insure that competing purchasers from the same seller would receive allowances on a nondiscriminatory basis. This purpose would be defeated if a seller could justify discriminations by the general showing that its competitors were granting promotional allowances and that it would be competitively disadvantaged by failure to utilize allowances as a method of sales promotion. If this were the rule, all sellers could justify discriminations in the grant-

ing of promotional allowances merely by showing the general use of such allowances by others in the industry and the value of such allowances as a competitive tool. The granting of promotional allowances would then be governed by a broad reading of 2(b), not by 2(d) which requires that promotional payments be made available on proportionally equal terms.

The meeting competition defense, however, is an exception to the prohibitions of the statute and, as such, must be strictly construed. *The Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission,* 106 F. 2d 667 (3rd Cir. 1939), *United States* v. *Scharton,* 285 U. S. 518, *Spokane & I. E. R. Co.,* v. *U. S.,* 241 U. S. 344. In cases brought under both 2(a) and 2(d), therefore, a discrimination may be justified as a good faith "meeting of competition" only when the seller is otherwise complying with the applicable sub-section and the particular discrimination is made in a genuine defensive response to another seller's offer in a specific transaction.[2] In other words, a seller who has made no attempt to comply with the substantive requirements of the Act is precluded from claiming that his discriminations were made in good faith to meet competition.[3] We have held therefore that a seller engaging in cooperative advertising must do so

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[2]It is for this reason that the Commission and the courts have consistently held that discriminations made generally to meet competition do not come within the meeting competition defense. "Section 2(b) permits a single company to sell one customer at a 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor' ". *Federal Trade Commission* v. *Cement Institute, et al.,* 333 U. S. 683, 725.

[3]See in this connection *Federal Trade Commission* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746, wherein one of the reasons given by the Court for rejecting the 2(b) defense was that respondents had "never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition".

through a comprehensive, nondiscriminatory program, and that after such a program has been established, deviations from it in the form of more generous allowances may be excused in individual instances shown to be good faith attempts to meet promotional allowances furnished by competitors. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 1965 Trade Cas. ¶ 71,491.

Respondent's argument that the hearing examiner erred in dismissing its 2(b) defense is rejected. We are of the opinion that respondent has failed to establish that its discriminatory allowances were made in good faith to meet competitors' allowances for the reasons set forth in the initial decision.

Respondent's appeal is denied. The hearing examiner's initial decision will be adopted as the decision of the Commission.

Commissioner Elman dissented and has filed a dissenting opinion.

September 19, 1966

Dissenting Opinion

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of
RABINER & JONTOW, INC.
a corporation
Docket No. 8629

Commissioner Elman, dissenting:

This case is part of the Commission's program, initiated in 1962, to eliminate discriminatory promotional allowances in the wearing apparel industry through the imposition of orders upon a number of suppliers. I will not repeat here in detail any reasons for believing that that program has been neither effective nor equitable. See *Abby Kent Co., Inc.*, Docket No. C-328 (August 9, 1965) (dissenting opinion).

As the Commission recognizes, violations of Section 2(d) have been widespread in the wearing apparel industry; department and specialty store chains to a large extent have been responsible for discriminatory allowances in the industry; and individual suppliers, like respondent, have felt compelled to grant such allowances because of general competitive conditions in the industry. The wearing apparel industry is highly fragmented, consisting of thousands of

manufacturers, most of them very small in relation to the chain and department store buyers. For most manufacturers, the buyer is in the driver's seat; whatever he wants in the way of advertising or promotional allowances, the buyer is usually in a good position to get.

Respondent is one of the two suppliers, out of the group of about 300 sued by the Commission, which refused to sign 2(d) consent orders. The suppliers which signed such orders represent only a fraction of the entire industry, and only eight of the outstanding orders are directed against members of respondent's particular segment of the industry —ladies' coats and suits. As respondent points out, more than 500 of its direct competitors are not under order. It is not hard to see why an enforcement policy designed to place even a substantial number of suppliers under order can accomplish little. The ability of large and powerful buyers to exact discriminatory allowances from suppliers not under order remains unimpaired. Even if the Commission could be sure of full compliance with the outstanding orders, this basic gap would not be plugged. Moreover, the impression persists that issuance of these orders has had little or no effect in eliminating discriminatory allowances in the industry. According to industry spokesmen, "there is a great missing step between the law and its enforcement" and "the Commission orders have not deterred some leading retailers from continuing to demand and receive discriminatory advertising allowances." (*New York Times*, July 10, 1966, sec. 3, p. 1.) In view of the general competitive conditions prevailing in the industry and the Commission's limited capacity to police outstanding orders, many suppliers under order apparently feel that they must continue to grant discriminatory allowances.

The Commission's enforcement policy is deficient in yet another respect. If, as seems to be assumed, many department and specialty store chains have a practice of inducing and receiving discriminatory promotional allowances, that practice is surely not confined to ladies' coats and suits or to any other single line or product. Department stores nowadays sell almost everything under the sun. Even if the Commission were to place under order every supplier in the wearing apparel industry—and no one suggests that it should or could—large department and chain store buyers would still be able to obtain discriminatory allowances on all the other products they carry. Thus, the imposition of orders on cloak-and-suiters like respondent does not even make a dent in the problem of alleged abuses of buying power by large retailers. The issuance of this order, like the other orders against suppliers, has moved the Commission no closer to its goal of eliminating prevalent illegal and discriminatory promotional allowances—whether in the ladies' coat and suit industry, the wearing apparel industry generally, or in any other industry making products sold in chain or department stores.

I think it is also inequitable to issue this order against respondent. The Commission holds that it is not a defense that these allowances were granted in response to general competitive conditions in that segment of the garment industry of which respondent is part. Again, I will not repeat here my reasons for believing that the Commission's interpretation of the 2(b) defense imposes an impossible and unrealistic burden on sellers. See, e.g., *National Dairy Products Corp.*, Docket No. 7018 (decided July 28, 1966) (dissenting opinion); *Tri-Valley Packing Co.*, Docket No. 7225 (decided July 28, 1966) (dissenting opinion). In

order to satisfy the Commission that it was meeting competition in good faith, a respondent must prove that the "payments were made in order to meet comparable payments in specific, individual, competitive situations"; it is not enough to show that it acted defensively in response to "general competitive conditions" prevailing in the segment of the industry in which it does business. To prove its good faith, a respondent must come forward with "documentation" or "specific evidence" showing that it used "reasonable diligence in verifying the existence" of a comparable allowance offered by a particular competitor.

As applied to the circumstances existing in the wearing apparel industry, these requirements of proof make the 2(b) defense unavailable, as a practical matter, to any supplier against which the Commission determines to proceed. Whatever the technical justification for the Commission's position, we should recognize the actual commercial consequences. In this industry, as the Commission has recognized, discriminatory allowances are both "widespread" and secretive". *Abby Kent Co., supra.* To bar a single seller, or only some sellers, from granting allowances in an industry where the practice has become an everyday competitive necessity, and where it derives from the covert exertion of pressure by large and powerful buyers, means that such sellers will have to compete at a substantial disadvantage. In this industry, if a chain or department store buyer tells a seller that he wants a promotional allowance, the seller need not be informed whether the buyer has already received a specific offer of a comparable allowance from a specific competitor; he knows well enough from general conditions prevailing in the industry that the buyer can and will obtain such an allowance,

whether from the seller or a competitor, and unless the seller grants the requested allowance he will lose the account. What more does he have to know in order to meet competition in good faith?

For these reasons and others I have elaborated elsewhere, it seems to me to be a serious mistake in the allocation of its enforcement resources for the Commission to have channeled, and to be continuing to channel, its energies primarily in the direction of imposing 2(d) orders on a relatively small number of suppliers in scattered segments of the wearing apparel industry. It would have been, and still would be, far more effective and more equitable for the Commission to pursue an enforcement policy realistically designed to accomplish the central objective of the Robinson-Patman Act, i.e., "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power". *F. T. C.* v. *Henry Broch & Co.*, 363 U. S. 166, 168. I would follow here the general enforcement policy—aimed primarily at alleged abuses of buying power—which was stated not too long ago in *Max Factor* and *Shulton* (Docket Nos. 7717 and 7721, July 22, 1964).

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No. 1100

In the Supreme Court of the United States

OCTOBER TERM, 1967

RABINER & JONTOW, INC., A CORPORATION NOW KNOWN AS ABBE RABINER, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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After extensive administrative proceedings, the Federal Trade Commission adopted its hearing examiner's findings (J.A. 13a–73a)[1] that petitioner, a manufacturer of women's coats and suits, had granted cooperative advertising allowances to six large retail stores in Boston, New York, and Washington in the years 1960 through 1962, without making such allowances available on proportionally equal terms to competitors of the favored customers,[2] in violation of

[1] "J.A." refers to the joint appendix in the court of appeals.

[2] Petitioner conceded that it had made the discriminatory payments (Pet. 6–7; see Pet. App. 3a, n. 2).

293-949—68

Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(d), and that petitioner had failed to establish that its discriminatory advertising payments were made in good faith to meet allowances granted by its competitors (J.A. 83a). The Commission rejected petitioner's claim that the proceedings against it were not in the public interest because other firms in the wearing apparel industry were engaging in the same illegal practices (J.A. 76a–80a). Accordingly, the Commission affirmed the decision of the hearing examiner and approved without modification the initial cease-and-desist order entered by him against petitioner (J.A. 72a–73a, 11a).

The complaint against petitioner represented one aspect of the Commission's efforts to deal with the problem of discriminatory advertising allowances in the wearing apparel industry. Having determined, as a result of an investigation begun in 1961, that the practice of granting such allowances was widespread, the Commission offered manufacturers believed to be thus violating the law an opportunity to consent to the entry of cease-and-desist orders. From 1962 through 1964, some 310 manufacturers of wearing apparel, including petitioner, were invited by the Commission to agree to the entry of such consent orders; 298 of them did so.[3] When petitioner declined, the instant proceeding was instituted (J.A. 117a–119a; Pet. App. 2a–3a; see *Abby Kent Co., et al.*, CCH Trade Reg. Rep. (1965–1967 Transfer Binder) ¶ 17, 310).

[3] The orders against all 298 consenting manufacturers were made effective simultaneously on August 9, 1965 (J.A. 77a).

In the court of appeals, petitioner did not dispute the Commission's finding that it had violated Section 2(d) (Pet. App. 4a). Rather, it contended that the Commission had acted arbitrarily by proceeding against it while some of its competitors remained free to continue similar unlawful practices, and asked that the order against it be set aside.[4] The court of appeals, after reviewing the decisions of this Court in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, and *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, held that petitioner had not shown that the Commission had abused its discretion and affirmed the Commission's order (Pet. App. 6a, 9a).

The sole question which petitioner presents to this Court is whether the court of appeals erred in refusing to stay the Commission's order (Pet. 2). We submit that the decision of the court of appeals is correct and that there is no occasion for further review.

1. Petitioner asserts that the court of appeals improperly read the decisions of this Court in *Moog Industries*, and *Universal-Rundle* as placing "in the hands of the Commission sole authority" to determine "whether or not it had acted arbitrarily" and as withdrawing that question from judicial examination (Pet. 14). This suggestion is clearly without merit.

[4] The court of appeals treated the request as one for a stay of enforcement of the cease-and-desist order, noting that petitioner would not be entitled to have the order set aside even if its claim of abuse of agency discretion were sustained (Pet. App. 4a).

Indeed, the court below, observing that this Court in *Moog Industries* had "noted the peculiar discretion given to the Commission in the shaping of its remedies" (Pet. App. 4a), expressly referred to and applied (Pet. App. 6a) the standard of review stated by this Court in *Universal-Rundle, supra,* 387 U.S. at 250:

> * * * [T]he reviewing court's inquiry is not whether the evidence adduced in support of a petition for a stay tends to establish certain facts, such as that the industry is engaged in allegedly illegal price discrimination practices; rather, the court's review must be limited to determining whether the Commission's evaluation of the merit of the petition for a stay was patently arbitrary and capricious.

The court of appeals found that "there is no indication that the Commission acted arbitrarily in proceeding against petitioner" (Pet. App. 6a), and thus made precisely the kind of judicial determination called for by *Universal-Rundle*. Moreover, the court below noted that "the Commission appears to have made every effort to achieve industrywide compliance in as equitable a manner as possible under the circumstances" (Pet. App. 7a).

2. Moreover, the court of appeals was plainly correct in concluding that petitioner had failed to establish that the Commission's proceeding against it constituted a patent abuse of discretion. As the court pointed out (Pet. App. 6a):

> An extensive industry-wide investigation was conducted and almost 300 consent orders were obtained before the present action was taken. The Commission held public hearings on how

> enforcement could best be achieved and various proposals were submitted from industry representatives. Even then, the Commission considered the possible competitive disadvantage its orders might have and waited until 1965 to make those orders effective. *Abby Kent Co., et al.*, FTC Docket No. C–328 *et al.* (August 9, 1965), CCH Trade Reg. Rep. (1965–1967 Transfer Binder) [¶ 17,310] at p. 22,461.

Abby Kent Co. makes it clear that the Commission carefully considered the various means available to it for bringing about a cessation of the unlawful practices it had discovered, and that it deferred the effective date of the consent orders so as to secure compliance from as many firms as possible. The order against petitioner was entered by the hearing examiner on July 16, 1965 (J.A. 73a); on August 9, 1965, the Commission made effective the orders covering the 298 consenting firms (J.A. 77a); and on September 19, 1966, the Commission affirmed the order against petitioner (J.A. 11a–12a).

Petitioner contends, however, that of the 298 wearing apparel firms against which consent orders were obtained, only seven were, like petitioner, manufacturers of women's coats and suits; that there are some 500 such firms not under such an order;[5] and, therefore, that petitioner will suffer competitive harm

[5] Petitioner's reference to some 500 competitors is an exaggeration. Petitioner's own expert witness determined that, in 1963, the number of firms in the entire United States whose merchandise was sold in the same "price zone" as petitioner's was 161 (J.A. 113a–114a, 38a–40a, 104a–106a); this figure doubtless includes firms which did not sell in the same cities and to the same customers as petitioner.

because of the instant proceeding and the resulting order (Pet. 11). This contention was fully considered and was rejected by the court of appeals. The court noted that "[p]etitioner has not shown that violations of Section 2(d) are prevalent in that segment of the industry in which it operates"; that "[p]etitioner has failed to show that compliance with the Commission's order will place it at a competitive disadvantage"; that the "Commission is continuing to take action against violators," citing a number of Commission proceedings; and that the Commission's order leaves petitioner "free to establish its own nondiscriminatory promotional plan and, when necessary, offer certain customers the same amount as a competitor whose allowance it may have to meet [so as to] minimize any competitive disadvantage" (Pet. App. 7a–9a).[6]

[6] Petitioner suggests, apparently for the first time, that, under the instant cease-and-desist order, it could meet only lawful promotional allowances given by competitors (see *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231), and that this group would include "at most 7 companies who have filed lawful plans" (Pet. 13–14). This is speculation without support in the record. Petitioner did not demonstrate that its competitors other than the seven "who have filed lawful plans" are in fact granting unlawful advertising allowances. As the court of appeals noted (Pet. App. 8a): "Although petitioner alleges that widespread violations do in fact remain in the industry, it has never provided the Commission with names or other information upon which the Commission could take appropriate action." Moreover, even if some of petitioner's competitors are granting unlawful allowances, the court of appeals pointed out that the "Commission is continuing to take action against violators" (*ibid.*). In any event, the existence of similar violations by petitioner's competitors does not, of itself, require that the order against petitioner be stayed. See *Universal-Rundle*, *supra*, 387 U.S. at 251.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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